No. 13606

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and to the Use of Westinghouse Electric Supply Company, WM. RADKOVICH COMPANY, INC., et al.,

Appellees.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 260, inclusive)

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13606

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, at the Relation of and to the Use of Westinghouse Electric Supply Company, WM. RADKOVICH COMPANY, INC., et al.,

Appellees.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 260, inclusive)

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

JOHN E. McCALL,
J. HAROLD DECKER,
GEORGE B. T. STURR,
ALBERT LEE STEPHENS, JR.,

535 Rowan Bldg., 458 S. Spring St.,
Los Angeles 13, Calif.

For Appellees Wm. Radkovich Company, Inc., and its Sureties:

ANDERSON, McPHARLIN & CONNERS,

1017 Rowan Bldg., 458 S. Spring St.,
Los Angeles 13, Calif.

For Appellee Westinghouse Electric Supply Company:

GLEN BEHYMER,

415 Auditorium Bldg., 427 West Fifth St.,
Los Angeles 13, Calif.

For Appellee E. B. Woolley:

FRANK M. BENEDICT,
920 Rowan Bldg., 458 S. Spring St.,
Los Angeles 13, Calif. [1*]

---

* Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 9303-Y

UNITED STATES OF AMERICA, at the Relation of and to the Use of Westinghouse Electric Supply Company, a Corporation, Plaintiff,

vs.

WM. RADKOVICH COMPANY, INC., a Corporation, United Pacific Insurance Company, a Corporation, General Casualty Company of America, a Corporation, Excess Insurance Company of America, a Corporation, Manufacturers' Casualty Insurance Company, a Corporation, and E. B. Woolley, Defendants.

COMPLAINT

Upon Bond and Against Contractor for Materials and Labor Upon Government Contract

I.

Plaintiff avers that Westinghouse Electric Supply Company, a corporation, for whose benefit this suit is brought, is a materialman who furnished and supplied labor and materials to be and which were used by Defendant E. B. Woolley, sub-contractor, acting under Defendant Wm. Radkovich Company, Inc., a corporation, general contractor, for the performance of a certain contract entered into between said last named corporation, as contractor, and the United States of America, dated the 19th day of June, 1947, for the construction of public works within the meaning of the Act of Congress of August 24, 1935, (49 Statutes [2] 793), being the Federal Public

Works Bond Act, commonly known as the "Miller Act".

That Westinghouse Electric Supply Company is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Delaware, and duly authorized to do business in the State of California, and with an office and place of business therein at Los Angeles, California, and elsewhere.

II.

That the Defendant, United Pacific Insurance Company, is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Washington, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

That the Defendant, General Casualty Company of America, is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Washington, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

That the Defendant, Excess Insurance Company

of America, is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein. [3]

That the Defendant, Manufacturers' Casualty Insurance Company, is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

That the Defendant, Wm. Radkovich Company, Inc., is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of California, with an office and its principal place of business in the County of Los Angeles, State of California; that said corporation was and is authorized to engage in the general construction contracting business.

III.

That pursuant to a printed invitation for bids given by the War Department of the United States

of America, the Defendant, Wm. Radkovich Company, Inc., submitted its bid and was awarded the contract for the performance of all the work required for the construction of Temporary Family Quarters, Job No. Muroc AAF 7-210-2, at Muroc Army Air Field, Muroc, California, in accordance with the specifications for the construction of said work.

That the contract so awarded was made and executed and bears date of June 19, 1947; that by the terms of said building contract, it was provided that the said Defendant, Wm. Radkovich Company, Inc., should erect and construct the improvements above referred to as the prime contractor for the United States of America as owner, at Muroc, California, for an estimated contract price of $749,999.50, as required by the plans and specifications referred to in said contract. [4]

IV.

That for valuable and adequate considerations, moving severally to the Defendant-Surety Companies next named, the Defendants, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation, severally made, executed and delivered, and the said last named companies caused to be filed with the proper government officials a certain Standard Form of Payment Bond (Construction), pursuant to said Act of Congress, approved August 24, 1935 (49 Statutes 793), whereby in the aggre-

gate said four Defendant-Surety Companies bound themselves as Sureties for said Defendant, Wm. Radkovich Company, Inc., a corporation, unto the United States of America in the aggregate penal sum of $374,999.75, and wherein said bond it is recited that said Sureties, while being bound firmly by said bond jointly and severally, are bound under the terms of the following proviso: "Provided, That we the Sureties bind ourselves in such sum 'jointly and severally' as well as 'severally' only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the principal, for the payment of such sum only as is set forth opposite its name in the following schedule", in which schedule the respective limits of liability for the respective four Defendant-Surety Companies is set forth as $93,749.94, and in which bond, subject to the proviso above set forth, it is agreed that if the principal should faithfully perform its contract and all of its terms, covenants and conditions and should promptly pay to all persons supplying the principal with labor and materials in the prosecution of the work in the contract provided, then the obligation is to be void; otherwise, it shall remain in full force and virtue; that specific reference is hereby made to said bond for its [5] full terms, said bond being attached hereto and marked "Exhibit A".

That said bond is and at all times since the execution and delivery thereof as aforesaid has been in full force and effect; that the said Defendant,

Wm. Radkovich Company, Inc., joined in the execution of said bond as principal and in the penal sum of $374,999.75, as more particularly set forth in the copy of said bond attached hereto.

V.

That thereafter the said Wm. Radkovich Company, Inc., entered upon the performance of its contract and thereafter completed said contract, and in the performance of said work employed the Defendant, E. B. Woolley, as a sub-contractor, to perform a certain portion of the work embraced within the general contract or prime contract hereinbefore referred to, the exact amount of work embraced in said contract being to this Plaintiff unknown, but including within its scope the furnishing and installation of all electrical installations on said job as the electrical sub-contractor, and Plaintiff is informed and believes and upon such information and belief alleges that said electrical subcontract by its terms provided for a payment to said Defendant, E. B. Woolley, of the aggregate sum of $80,000.00.

That Plaintiff is informed and believes and upon such information and belief alleges that said prime contract and the performance of the work required thereunder has been completed, but that no final settlement thereof has been made by the United States of America, through its properly constituted officers.

VI.

That the War Department of the United States of America was duly authorized and empowered by

law to undertake the construction of said buildings and improvements, and that the same were undertaken and built upon land owned by the United States of [6] America at Muroc, California.

VII.

That from time to time during the progress of the construction of the work of improvement referred to in this Complaint, and between on or about the 19th day of August, 1947, and on or about the 31st day of March, 1948, the said Westinghouse Electric Supply Company, a corporation, at the special instance and request of the Defendant, E. B. Woolley, and upon the promise of the said Defendant, E. B. Woolley, to pay the prices quoted by Plaintiff therefor to said Defendant, which prices at all times were likewise the reasonable value thereof, sold and delivered certain electrical equipment, supplies and materials for use in, and which were used in said work of improvement, and which were of the total agreed price and reasonable value of $52,622.13; that thereafter, there was paid on account of said materials so sold and delivered, in cash, the sum of $9,108.08, and no more, leaving a balance due, owing and unpaid on account thereof in the sum of $43,514.05; that the following is a tabulation of the materials furnished, the shipping date of the order therefor given by the said Defendant, E. B. Woolley, and the amount agreed to be paid therefor by said Defendant, E. B. Woolley, and charged for the same respectively:

Shipping Date	Item	Amount
August 19, 1947	20,000 ft. of ½" steel tube	$ 1,200.43
August 19, 1947	1,000 ft. of 1½" galvanized conduit	281.98
August 25, 1947	2 only No. K-80009 Panel Cans; 1 only No. 14197 Appleton steel tube bender; 1 only No. 4196 Thomas & Betts bender; 1 only H. U. 20 Black & Decker grill	57.21
August 28, 1947	1500 ft. ¾" steel tube	129.90
August 29, 1947	1 only L.R. Can and 5 only W. Cans	14.76
September 12, 1947	3500 ft. ¾" steel tube	308.45
September 15, 1947	100 only No. 72171 galvanized boxes; 100 only 72-C-3 plaster rings; 500 only No. 54-C-3 galvanized box covers; 100 only 54-C-1 galvanized box covers; 300 only 52151 special galvanized boxes; 1800 No. 52151½ galvanized boxes; 1500 No. 52-C-13 plaster rings; 100 No. 52-C-17 plaster rings; 100 No. 3865 Thomas & Betts ground bushings; 100 only No. 1 Perry ground clamps; 300 only 4 D thru boxes; 1700 only No. 5221 Thomas & Betts ¾" connectors; 1700 only No. 5220 Thomas & Betts couplings; 4900 only No. 5120 Thomas & Betts connectors; 1800 only No. 5120 Thomas & Betts couplings; 400 only No. 5321 Thomas & Betts connectors; 400 only No. 5320 Thomas & Betts couplings	2,320.73
September 17, 1947	300 ft. 1" steel tube	34.47
September 24, 1947	125 only No. 54571 ½" concrete boxes	71.88
September 25, 1947	6 only No. 3846 Bryant range receptacles	14.98
September 25, 1947	99 only L. R. Cans and 200 only W. Cans	735.54
September 29, 1947	295 W. Cans	725.70
September 29, 1947	6000 ft. ½" steel tube	350.55
October 6, 1947	56 only No. 3851 Thomas & Betts ground bushings	10.91
October 16, 1947	400 ft. 1" steel tube	48.66
October 20, 1947	1000 ft. No. 6-3 type S. wire; 1000 ft. 12-3 type S. wire; 1 only No. D.F. 322 I Switch; 1 only No. D.F. 323 Switch; 6 only No. Non-60 Fuses; 6 only Non-100 Fuses; 1 only 42" general cable reel	720.68
October 31, 1947	2550 ft. No. 8 type T.W. Rome Wire; 18,610 ft. No. 10 T.W. general cable wire; 24,000 ft. No. 12 T.W. Rome wire	872.18

Shipping Date	Item	Amount
November 7, 1947	268 only No 52-C-48 plaster rings	30.53
November 11, 1947	1500 ft. ¾" steel tube	132.55
November 13, 1947	5 only No. 3846 Bryant range receptacles	11.27
November 13, 1947	5000 ft. ¾" steel tube	441.84
November 14, 1947	100 only No. 72-C-18 plaster rings	37.90
November 18, 1947	300 ft. 2" Sheridized conduit	116.70
November 20, 1947	2300 ft. ¾" steel tube	200.38
December 3, 1947	2000 ft. 1" steel tube	244.98
December 22, 1947	44 only No. 3861 Thomas & Betts ground bushings	8.72
December 10, 1947	200 ft. 1" steel tube	23.41
December 18, 1947	200 ft. 2" Sheridized Conduit	83.52
December 22, 1947	1000 ft. No. 4 Wire	85.36
January 13, 1948	132 - 52-C-48 Plaster rings	15.22
January 20, 1948	1000 ft. 1" steel tube	114.90
January 26, 1948, February 26, 1948, March 4, 1948, March 9, 1948, March 16, 1948	Extensions 1-2-3-4-5 Wire	1,906.02
January 28, 1948	100 special type N.A.B. 3-L Panels (Individual house switchboards)	18,798.50
February 13, 1948	175 - 54571 Concrete Boxes	109.89
February 13, 1948	1500 ft. 1-O Type R. H. black Wire	319.06
February 27, 1948	100 L. R. 161 Heaters; 100 W-202 M.U. Thermador Air Heaters; 200 W-302 M.U. Thermador Air Heaters; 200 W-402 M.U. Thermador Air Heaters	21,999.58
March 23, 1948	5 W. Cans	13.12
March 31, 1948	40 Bryant receptacles	99.41
	Total	$52,691.87
October 17, 1947	Credit Memorandum, Invoice No. J-27329	$39.12
March 31, 1948	Credit Memorandum, Invoice No. S-55082	$30.53
	Total Credits	$ 69.65
	Total Account	$52,622.22
	Less: Paid on account	$ 9,108.09
	Balance Due	$43,514.05

That by the terms of sale of said merchandise, it was provided that the Defendant, E. B. Woolley, would pay the purchase price thereof as follows: For all deliveries during any given calendar month, the full price thereof on the 10th of the month next succeeding the month of delivery; that the last delivery was made on the 31st day of March, 1948, and that the last of said materials by the terms of such sale were to be paid for by said Defendant, E. B. Wooley, on or before the 10th day of April, 1948; that the whole of said balance of $43,514.05 became due and owing on the said 10th day of April, 1948; and that there is now unpaid said balance of $43,-514.05 with interest thereon, at the rate of seven percent (7%) per annum from and after the 10th day of April.

VIII.

That said materials and supplies so furnished were actually used by the said Defendant, E. B. Woolley, electrical sub-contractor, in the performance of his said sub-contract with the Defendant, Wm. Radkovich Company, Inc., and in the work required to be done by the said prime contractor under the specifications and in the performance of the work embraced within the said prime contract aforementioned, and that the said materials actually went into said work and the structures erected.

That since the delivery of said materials by Plaintiff it has made demand upon the said Defendant, E. B. Woolley, sub-contractor, the Defendant, Wm. Radkovich Company, Inc., [11] prime contractor, as principal on said payment bond, and

upon each and every of the said Defendant-Sureties of said prime contractor, for the payment of the amount due to it for said materials so furnished, but said Defendants, and each of them, have failed, neglected and refused and still do fail, neglect and refuse to pay said sum, or any part thereof.

IX.

That inasmuch as the said Plaintiff had no direct contractual relationship with said prime contractor furnishing said payment bond, but had direct contractual relationship with said sub-contractor, as aforesaid, the Plaintiff, Westinghouse Electric Supply Company, did, on or about the 10th day of April, 1948, deposit in the United States mail, postage prepaid and registered, in an envelope addressed to the prime contractor, the Defendant, Wm. Radkovich Company, Inc., at a place of business maintained by said Defendant last named, and at which place the said Defendant did then and there maintain an office, to-wit, at 4920 East Washington Boulevard, Los Angeles, California, a Notice, in writing, stating with substantial accuracy the amount claimed by said Plaintiff, Westinghouse Electric Supply Company, to-wit, $43,514.05, and the name of the party to whom said materials were furnished, to-wit, the said Defendant, E. B. Woolley, and said Plaintiff, Westinghouse Electric Supply Company, is informed and believes and upon such information and belief alleges that said Notice was actually received by the said Defendant, the Wm. Radkovich Company, Inc., on the 11th day

of April, 1948; that a true and correct copy of said Notice to said prime contractor is in words and figures as set forth in Exhibit B, attached hereto and made a part hereof.

That said Notice was so mailed to said prime contractor, as aforesaid, within ninety (90) days from the date on which the said Plaintiff, Westinghouse Electric Supply Company, furnished [12] the last of the materials to be supplied by it; that the last of the materials supplied by it on said job was supplied on the 31st day of March, 1948.

X.

That said balance of $43,514.05 due, owing and unpaid to this Plaintiff, as aforesaid, has not been paid, and has not been paid before the expiration of a period of ninety (90) days after the date upon which the last of said materials were furnished by said Plaintiff, Westinghouse Electric Supply Company, and that more than ninety (90) days from the date of furnishing of said last materials has now elapsed, and that this action is being filed before the expiration of one (1) year after the date of final settlement of such contract, final settlement thereof not having as yet been made.

For a Further, Separate and Second Cause of Action, Plaintiff Alleges:

I.

Plaintiff incorporates herein by reference the allegations contained in Paragraphs I, II, III, IV,

V, VI, VIII, IX and X of its First Cause of Action with the same force and effect as though the same were set out in full at this point.

II.

That between on or about the 19th day of August, 1947, and on or about the 31st day of March, 1948, at the special instance and request of the Defendant, E. B. Woolley, and upon his promise to pay the reasonable value thereof, the said Plaintiff, Westinghouse Electric Supply Company, sold and delivered to said Defendant, E. B. Woolley, and furnished for use in said work of improvement above referred to said electrical materials and supplies required in the performance of said work, and in the completion of the sub-contract of the said Defendant, E. B. Woolley, [13] and embraced within the general contract of the said Defendant, Wm. Radkovich Company, Inc., and which materials were of the reasonable value of $52,622.13; that all of the said materials were used in the performance of said work of improvement and in connection with the performance of said prime contract and were consumed therein; that no part of the purchase price thereof has been paid, except the sum of $9,108.08; and that there is due, owing and unpaid on account thereof the net balance of $43,514.05, after deducting all just credits and offsets.

Wherefore, the United States at the relation of and to the use of said Westinghouse Electric Supply

Company, a corporation, Plaintiff herein, prays judgment against the Defendants as follows:

(1) Against the Defendants, E. B. Woolley, and the Wm. Radkovich Company, Inc., and each of them, for the sum of $43,514.05, plus interest thereon from the 10th day of April, 1948, at the rate of seven percent (7%) per annum until paid;

(2) Against the Defendants, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation, and each of them, jointly and severally, in a like sum as is prayed agianst their principal, the Wm. Radkovich Company, Inc.;

(3) For Plaintiff's costs of suit in this action expended; and

(4) For such other and further relief as to the court may seem meet and proper and consistent with equity.

/s/ GLEN BEHYMER,
Attorney for Plaintiff. [14]

State of California,
County of Los Angeles—ss.

W. F. Gebhard, being by me first duly sworn, deposes and says: that he is the Attorney-in-Fact of Westinghouse Electric Supply Company, a corporation, Plaintiff, in the above entitled action; that he has read the foregoing Complaint Upon Bond and Against Contractor for Materials and Labor Upon

Government Contract and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ W. F. GEBHARD

Subscribed and sworn to before me this 24th day of February, 1949.

[Seal] /s/ MURIEL J. RINGROSE,
Notary Public in and for the County of Los Angeles, State of California. My commission expires July 1, 1951. [15]

[Endorsed]: Filed Feb. 25, 1949.

In the District Court for the United States, Southern District of California, Central Division

No. 9303-Y

UNITED STATES OF AMERICA, et al.,
Plaintiff,

vs.

WM. RADKOVICH COMPANY, INC., a corporation, et al.,
Defendants.

WM. RADKOVICH COMPANY, INC., a corporation, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation,
Cross-Claimants,

vs.

E. B. WOOLLEY and GLENS FALLS INDEMNITY COMPANY, a corporation,
Cross-Defendants.

CROSS-CLAIM [31]

Cross-claimants aver:

I.

That the cross-claimant Wm. Radkovich Company, Inc., is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of California, with an office and its principal place of business in the County of Los Angeles, State of California; and at all times herein mentioned was and now is a duly licensed contractor in the State of California.

II.

That cross-claimant United Pacific Insurance Company is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Washington, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

III.

That cross-claimant General Casualty Company of America is now and at all times herein mentioned was a corporation duly organized, existing and doing business under by virtue of the laws of the State of Washington, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

IV.

That cross-claimant Excess Insurance Company of America is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such

surety bonds in said State and to do business therein. [32]

V.

That cross-claimant Manufacturers' Casualty Insurance Company is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Pennylvania, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

VI.

That cross-defendant Glens Falls Indemnity Company is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

VII.

That pursuant to a printed invitation for bids given by the War Department of the United States of America, the cross-claimant Wm. Radkovich Company, Inc., submitted its bid and was awarded the contract for the performance of all the work required for the construction of Temporary Family Quarters, Job No. Muroc AAF 7-210-2, at Muroc

Army Air Field, Muroc, California, in accordance with the plans and specifications for the construction of said work.

That the contract so awarded was made and executed and bears date of June 19, 1947; that by the terms of said building contract, it was provided that the said defendant Wm. Radkovich Company, Inc., should erect and construct the improvements above referred to as the prime contractor for the United States of America as owner, at Muroc, California, for an estimated contract price of $749,-999.50, as required by the plans and specifications referred to in said contract. [33]

VIII.

That for valuable and adequate considerations, moving severally to the cross-claimants-Surety Companies next named, the United Pacific Insurance Company, a Corporation, General Casualty Company of America, a Corporation, Excess Insurance Company of America, a Corporation, and Manufacturers' Casualty Insurance Company, a Corporation, severally made, executed and delivered, and the said companies caused to be filed with the proper government officials a certain Standard Form of Payment Bond, pursuant to said Act of Congress approved August 24, 1935, (49 Statutes 793), whereby in the aggregate said four cross-claimants-Surety Companies bound themselves as sureties for said cross-claimant Wm. Radkovich Company, Inc., a corporation, unto the United States of America in the aggregate penal sum of $374,999.75, and

wherein in said bond it is recited that said sureties, while being bound firmly by said bond jointly and severally, are bound under the terms of the following proviso:

"Provided, That we the Sureties bind ourselves in such sum 'jointly and severally' as well as 'severally' only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the principal, for the payment of such sum only as is set forth opposite its name in the following schedule", in which schedule the respective limits of liability for said respective four defendant-Surety Companies is set forth as $93,749.94, and in which bond, subject to the proviso above set forth, it is agreed that if the principal should faithfully perform its contract and all of its terms, covenants and conditions and should promptly pay to all persons supplying the principal with labor and materials in the prosecution of the work in the contract provided, then the obligation is to be void; otherwise, it shall remain in full force and virtue."

That said bond is and at all times since the execution and delivery thereof as aforesaid, has been in full force and effect; that the cross-claimant Wm. Radkovich Company, Inc., joined in the execution of said bond as principal. [34]

IX.

That thereafter the said cross-claimant Wm. Radkovich Company, Inc., entered upon the perform-

ance of its contract and thereafter completed said contract, and in the performance of said work employed the cross-defendant E. B. Woolley as a subcontractor to perform a certain portion of the work embraced within the general contract or prime contract hereinbefore referred to; that said subcontract included within its scope the furnishing of all labor and material, tools, machinery, equipment, facilities, supplies and services, and to do all of the things more specifically set forth and described therein, all in accordance in all respect with the certain specifications attached thereto, and including within its scope the furnishing and installation of and payment for all electrical installations on said job as the electrical subcontractor for an agreed cost of $80,000.00, subsequently modified in writing by agreement between said cross-claimant Wm. Radkovich Company, Inc., and said E. B. Woolley to the sum of $73,900.00.

X.

That for a valuable and adequate consideration moving to cross-defendant Glens Falls Indemnity Company, a corporation, said Glens Falls Indemnity Company executed and delivered and caused to be filed with cross-claimant Wm. Radkovich Company, Inc., a certain payment bond whereby said Glens Falls Indemnity Company bound itself, as surety for said cross-defendant E. B. Woolley, unto cross-claimant Wm. Radkovich Company, Inc., in the aggregate sum of $40,000.00, and in which bond it is agreed that if the principal shall indemnify and hold the said obligee free and

harmless from and against all loss and damage by reason of its failure to promptly pay all persons supplying labor and materials used in the prosecution of the work provided for in said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect.

That for a valuable and adequate consideration moving to cross-defendant Glens Falls Indemnity Company, a corporation, said Glens Falls Indemnity Company executed and delivered and caused to be filed [35] with cross-claimant Wm. Radkovich Company, Inc., a certain performance bond whereby said Glens Falls Indemnity Company bound itself as surety for said cross-defendant E. B. Woolley unto cross-claimant Wm. Radkovich Company, Inc., in the aggregate sum of $40,000.00, the condition of said bond being that if the principal shall well and truly perform and fulfill all the undertakings, covevants, terms, conditions and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the [Deleted by order of Oct. 31, 1950, signed JMS.]
with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

XI.

That thereafter, the said E. B. Woolley entered upon the performance of his contract and in the performance of said work furnished and [36] installed certain electrical installations as electrical subcontractor.

That claim is now made against these cross-claimants by Westinghouse Electric Supply Company, a corporation, that said Westinghouse Electric Supply Company, at the special instance and request of said cross-defendant E. B. Woolley, and upon his promise to pay the reasonable value, sold and delivered certain electrical equipment, supplies and materials for use in and which were used in said work or improvement, and which were, it is averred, of the total agreed price and reasonable value of $52,622.13, upon which there has been paid in cash the sum of $9,108.08, leaving a balance due, owing and unpaid on account thereof in the sum of $43,514.05 to recover which sum the instant action has now been brought by Westinghouse Electric Supply Company against these cross-claimants as defendants.

Said cross-claimants aver that there is due, owing and unpaid from cross-claimant Wm. Radkovich Company, Inc., to E. B. Woolley on account of the performance of said electrical subcontract a balance of $16,562.54 and no more.

Wherefore, cross-claimants pray that if judgment is entered herein against these cross-claimants as defendants in favor of plaintiff, Westinghouse Elec-

tric Supply Company, that it be adjudged that the balance due said cross-defendant from said Wm. Radkovich Company, Inc., is the sum of $16,562.54, and that cross-claimants may have judgment over against cross-defendants for any amount in excess of said sum found to be due said plaintiff, for cross-claimants' costs of suit in this action expended, and for such other and further relief as to the Court may seem meet and proper and consistent with equity.

ANDERSON, McPHARLIN & CONNERS,
/s/ By ELDON V. McPHARLIN,
Attorneys for Defendants and Cross-Claimants [38]

Affidavit of Service by Mail attached. [39]

[Endorsed]: Filed April 12, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS UNITED PACIFIC INSURANCE COMPANY, et al.

Come now United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers Casualty Insurance Company, a corporation, defendants in the action above entitled, and answering for themselves alone and not for their co-defendants, admit, deny and allege as follows:

I.

Answering paragraph I of the complaint these defendants are without knowledge or information sufficient to form a belief as to the truth of the averment therein that the plaintiff furnished and supplied labor and materials to be and which were used by defendant E. B. Woolley, subcontractor, acting under defendant Wm. Radkovich Company, Inc., a corporation, as averred therein. [42]

II.

Admit the allegations contained in paragraphs II, III and IV of the complaint.

III.

Admit the allegations in paragraph numbered V, except that these defendants allege on information and belief that said electrical subcontract referred to therein, by its terms, provided for a payment to said defendant E. B. Woolley of the aggregate sum of $73,900.00 instead of the aggregate sum of $80,000.00 as averred in said paragraph.

IV.

Admit the allegations in paragraph numbered VI.

V.

That these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered VII.

VI.

That these defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered VIII, except that they admit that a demand was made upon these answering defendants for the amount claimed by said plaintiff and that said claim has not been paid by them, or any of them.

VII.

Admit the allegations in paragraph numbered IX, except that these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the averment that the material referred to in said notice was in fact supplied on said job.

VIII.

That these answering defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered X.

Answering the Further, Separate and Second Cause of [43] Action:

I.

These defendants incorporate by reference their answers to paragraphs I, II, III, IV, V, VI, VIII, IX and X of the first cause with the same force and effect as though the same were set out in full.

II.

That these defendants are without knowledge or

information sufficient to form a belief as to the truth of the averments in paragraph numbered II of the said second cause of action.

Wherefore, defendants pray that the plaintiff take nothing by reason of their said action and that said defendants be hence dismissed with their costs.

ANDERSON, McPHARLIN & CONNERS,
/s/ By ELDON V. McPHARLIN,
Attorneys for Defendants [44]

Affidavit of Service by Mail attached. [45]

[Endorsed]: Filed April 12, 1949.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT WM. RADKOVICH COMPANY, INC., a Corporation

Comes now Wm. Radkovich Company, Inc., a corporation, one of the defendants in the action above entitled, and answering for itself alone and not for its co-defendants, admits, denies and alleges as follows:

I.

Answering paragraph I of the complaint this defendant is without knowledge or information sufficient to form a belief as to the truth of the averment therein that the plaintiff furnished and supplied labor and materials to be and which were used by defendant E. B. Woolley, subcontractor, acting

under defendant Wm. Radkovich Company, Inc., a corporation, as averred therein.

II.

Admits the allegations in paragraphs numbered II, III and IV.

III.

Admits the allegations in paragraph numbered V, except that this [46] defendant alleges that said electrical subcontract referred to therein, by its terms, provided for the payment to said defendant E. B. Woolley of the aggregate sum of $73,900.00 instead of the aggregate sum of $80,000.00 as averred in said paragraph.

IV.

Admits the allegations in paragraph numbered VI.

V.

That this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered VII.

VI.

That this defendant is without knowledge or information sufficient to form a belief as to the averments in paragraph numbered VIII, except that it admits that a demand was made upon this answering defendant for the amount claimed by said plaintiff and that said claim has not been paid by it.

VII.

Admits the allegations in paragraph numbered IX, except that this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the averment that the material referred to in said notice was in fact supplied on said job.

VIII.

That this answering defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered X, except that this defendant admits that this action is filed before the expiration of one year after the date of final settlement of such contract and that final settlement thereof has not yet been made.

Answering the Further, Separate and Second Cause of Action:

I.

This defendant incorporates herein by reference its answer to paragraphs numbered I, II, III, IV, V, VI, VIII, IX and X of the first cause of action with the same force and effect as though the same were set out in full. [47]

II.

That this defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered II.

Wherefore, defendant prays that the plaintiff

take nothing by reason of their said action and that it be hence dismissed with his costs.

ANDERSON, McPHARLIN & CONNERS,
/s/ By ELDON V. McPHARLIN,
Attorneys for Defendant Wm. Radkovich Company, Inc., a Corp.

Affidavit of Service by Mail attached. [49]

[Endorsed]: Filed April 12, 1949.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT OF DEFENDANT, E. B. WOOLLEY

E. B. Woolley answers plaintiff's complaint herein as follows:

I.

This answering defendant admits the allegations contained in Paragraphs I, II, III and IV of said complaint.

II.

Answering Paragraph V of said complaint, this answering defendant admits that Wm. Radkovich Company, Inc., entered upon the performance of its general contract therein mentioned and [50] thereafter completed said contract and in the performance of said work, made and entered into a contract with this defendant, dated July 30, 1947, called a sub-contract, wherein and whereby it was provided that this defendant should perform a cer-

tain portion of the work embraced within the general contract or prime contract thereinbefore in said complaint referred to, for a payment to this defendant of $80,000.00, but denies that the amount of work embraced in said sub-contract included within its scope the furnishing and/or installation of all electrical installations on said job and, in this connection, alleges that the scope of the work embraced in said sub-contract did not include the furnishing or installation of electrical fixtures, chime circuits, phone circuits or added closet lights on said job or any other supplies, equipment, installations or work except the supplies, equipment, installations and work set forth in said sub-contract.

III.

Answering Paragraphs VI and VII, this defendant admits each and every allegation therein contained.

IV.

Answering Paragraph VIII of said complaint, this defendant denies that all the said materials or supplies so furnished, as therein alleged, were actually or otherwise used by this defendant in the performance of his said sub-contract with defendant Wm. Radkovich Company, Inc., and in this connection alleges that a portion thereof was used by this defendant for extra work or additions to said sub-contract furnished at the specific request of said defendant Wm. Radkovich Company, Inc., and that it is true that all of said materials and supplies actually went into said work and in the structures

erected; further answering said paragraph this defendant alleges that he has no information or belief upon the subject matter of certain allegations therein contained sufficient to enable him to make answer thereto and [51] basing his denial upon that ground denies that all said materials or supplies therein mentioned were actually or otherwise used in the work required to be done by the said prime contractor under the specifications or in the performance of the work embraced within the said prime contract therein referred to and in this connection, this defendant is informed and believes and therefore alleges that a portion thereof was used for extra work or additions to said prime contract.

V.

Answering Paragraphs IX and X this defendant admits each and every allegation therein contained.

Answering Plaintiff's Further, Separate and Second Cause of Action, This Answering Defendant Admits, Denies and Alleges:

I.

Answering Paragraph I thereof, this answering defendant incorporates herein by reference, with the same force and effect as though set forth at length herein, Paragraphs I, II, III, IV and V of his answer to plaintiff's first cause of action.

II.

Answering Paragraph II thereof, this defendant

denies that all said electrical materials or supplies therein mentioned were required or used in the completion of the sub-contract of this defendant and, in this connection, alleges that a portion thereof was used by this defendant for extra work or additions to said sub-contract furnished at the specific request of defendant Wm. Radkovich Company, Inc.; further answering said paragraph this defendant alleges that he has no information or belief upon the subject matter of certain allegations therein contained sufficient to enable him to make answer thereto and basing his denial upon that ground denies that all said electrical materials or [52] supplies therein mentioned were required or consumed or used in connection with the performance of or embraced within the general or prime contract of defendant Wm. Radkovich Company, Inc., and in this connection this defendant is informed and believes and therefore alleges that a portion thereof was used for extra work or additions to said prime contract.

Wherefore, this answering defendant prays that plaintiff take judgment as prayed for in its complaint.

/s/ FRANK M. BENEDICT,
Attorney for Defendant, E. B. Woolley [53]

Affidavit of Service by Mail attached. [54]

[Endorsed]: Filed July 12, 1949.

[Title of District Court and Cause.]

ANSWER OF CROSS-DEFENDANT GLENS FALLS INDEMNITY COMPANY, A CORPORATION, TO CROSS-CLAIM

Comes Now Glens Falls Indemnity Company, a corporation, sued in the above entitled action as Cross-Defendant, and, answering for itself alone and not for its co-cross-defendant, admits, denies and alleges:

I.

Answering the allegations contained in paragraph IX, this defendant admits that a subcontract agreement was entered into between [55] the general contractor, Wm. Radkovich Company, Inc., by and through its President, Wm. Radkovich, and E. B. Woolley, as subcontractor, on or about the 30th day of July, 1947, but denies that said subcontract contained any provisions or conditions, as alleged in paragraph IX, or otherwise, except the terms and conditions specifically set forth in said subcontract, a copy of which is attached hereto marked Exhibit "A", and denies generally and specifically each and every other allegation in paragraph IX contained.

II.

Answering paragraph X of said Cross-Claim, this defendant admits that on or about the 6th day of August, 1947, it executed and delivered a Payment Bond and a Performance Bond, wherein E. B. Woolley was named as Principal, this defendant was named as Surety, and Wm. Radkovich Com-

pany, Inc., was named as Obligee, and that the penal sum of each bond was $40,000.00, but defendant denies generally and specifically that said bonds contained any terms or conditions, as alleged in paragraph X or otherwise, except such terms and conditions as are specifically set out in said bonds, copies of which are attached hereto as Exhibit "B" and made a part hereof by this reference.

III.

Answering the allegations contained in paragraph XI, this defendant admits that subcontractors E. B. Woolley entered upon the performance of said sub-XI, this defendant admits that subcontractor E. B. Woolley $16,562.54 under said subcontract, and that claim has been made against cross-claimants for certain electrical equipment, supplies and materials which said Westinghouse Electric Supply Company has alleged that it sold to said E. B. Woolley for use in the performance of his said subcontract, a copy of which is attached hereto as Exhibit "A".

This defendant has no information or belief sufficient to enable it to answer any of the other allegations contained in paragraph XI, and, placing its denial on that ground, denies that there [56] is due or owing from E. B. Woolley to Westinghouse Electric Supply Company $43,514.05, or any other sum, and denies that $16,562.54 is the balance due said E. B. Woolley by Wm. Radkovich Company, Inc.

This defendant is informed and believes and on that ground alleges that there is due and owing

and unpaid from Wm. Radkovich Company, Inc. to E. B. Woolley under the terms of said subcontract large sums of money, the exact amount of which this defendant does not know but will ask leave of the Court to insert the correct amount when it has been determined.

For a Further, Second and Separate Defense, This Defendant Alleges:

I.

That it is informed and believes, and, upon such information and belief alleges, that said subcontract was materially altered by the cross-claimant Wm. Radkovich Company, Inc., as contractor, and E. B. Woolley, as subcontractor, without the knowledge or consent of this defendant in that, among other things, payments were made by the cross-claimant Wm. Radkovich Company, Inc. to or for the use of subcontractor, E. B. Woolley, prior to the time that said payments became due under the terms of said contract.

Third Affirmative Defense

I.

That said building contract was altered to permit cross-complainant Wm. Radkovich Company, Inc. to take over control of said subcontract, and cross-claimant Wm. Radkovich Company, Inc. did take over control of said subcontract and did supervise and direct the purchase of materials and did take over and control and supervise said subcontract work.

That cross-claimant Wm. Radkovich Company, Inc., by so taking possession and control of said subcontract work, elected to and did [58] wholly waive any right to recover on said subcontract bond, a copy of which is attached hereto as Exhibit "B".

Fourth Affirmative Defense

I.

That this defendant is informed and believes, and upon such information and belief alleges, that between the 1st day of September, 1947 and the 31st day of December, 1948, cross-claimant Wm. Radkovich Company, Inc. prematurely paid or caused to be paid to or for the account of said subcontractor, E. B. Woolley, on account of said subcontract work, large sums of money in excess of monies then due the subcontractor on account of subcontract work.

Fifth Affirmative Defense

I.

That defendant is informed and believes and upon such information and belief alleges that said subcontract was altered by cross-claimant Wm. Radkovich Company, Inc. and subcontractor E. B. Woolley, so that the said subcontract was not performed or constructed according to the plans or the specifications referred to in said subcontract, a copy of which is attached hereto as Exhibit "A".

That the alterations of said subcontract, plans and specifications by the cross-claimant Wm. Radkovich Company, Inc., as general contractor, and E. B.

Woolley, as subcontractor, were made without the knowledge or consent of this defendant. [59]

Sixth Affirmative Defense

I.

That the Cross-Claim herein fails to state a claim against this defendant upon which relief can be granted.

Seventh Affirmative Defense

I.

That this defendant is informed and believes, and, upon such information and belief alleges, that cross-claimants ordered subcontractor E. B. Woolley to furnish extra and additional materials and to perform extra and additional work not called for by the subcontract or the plans or specifications referred to therein amounting to large sums of money for which cross-claimant Wm. Radkovich Company, Inc. refused to pay.

Wherefore, this defendant prays that the cross-claimants take nothing by their Cross-Claim; that this defendant be awarded judgment for its costs herein incurred, and for such other and further relief as may appear proper.

JOHN E. McCALL and
HAROLD J. DECKER,
/s/ By J. HAROLD DECKER,
Attorneys for Cross-Defendant Glens Falls Indemnity Company, a Corporation [60]

State of California,
County of Los Angeles—ss.

John E. McCall, being first duly sworn, says: That he is an Attorney at Law admitted to practice before all courts of the State of California, and has his office in the City of Los Angeles, County of Los Angeles, State of California, and is the attorney for the defendant, Glens Falls Indemnity Company, a corporation, in the above entitled action; that said defendant is unable to make this verification because it has no officer within Los Angeles County, and for that reason affiant makes this verification on defendant's behalf; that he has read the foregoing Answer of Cross-Defendant Glens Falls Indemnity Company, a Corporation, to Cross-Claim, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

/s/ JOHN E. McCALL

Subscribed and sworn to before me this 26th day of August, 1949.

[Seal] /s/ WALTER L. MANN,
Notary Public in and for the County of Los Angeles, State of California. [61]

EXHIBIT "A"

Sub-Contract Re War Department Construction Contract No. W-04-353-eng-2050

The within agreement made at Los Angeles, California this 30th day of July 1947 by and between Wm. Radkovich Company, Inc., a California corporation, of Los Angeles, California, (hereinafter called the contractor), and E. B. Woolley (an individual operating under the firm name of E. B. Woolley) with its principal office at Garvey, California (hereinafter called the sub-contractor:

Whereas, the contractor and the United States of America per the War Department, made and entered into, on the 19th day of June, 1947 a certain contract entitled "Construction Contract, War Department, Contract No. W-04-353-eng-2050 (hereinafter called the principal contract; and

Whereas, said principal contract requires the contractor to perform certain services and furnish certain labor and materials, tools, equipment, machinery, and supplies, as more particularly set forth therein; and

Whereas, the sub-contractor has read and fully is familiar with the terms, provisions and conditions of said principal contract, and understands the respective rights, powers, benefits, duties and liabilities of the contractor and of all sub-contractors and of the United States of America thereunder; and

Whereas, the parties hereto respectively desire that the sub-contractor shall, on behalf of the contractor, discharge certain of the duties of the con-

Exhibit "A"—(Continued)

tractor under such principal contract as hereinafter more particularly set forth or referred to.

Now, Therefore, the parties hereto do mutually acknowledge and agree as follows:

1. The contractor engages and the sub-contractor agrees that, under the general supervision of the contractor, the sub-contractor, upon receipt from the contractor of written notice to proceed, will furnish all labor and materials, tools, machinery, equipment, facilities, supplies and services, and do all the things more specifically set forth and described in Schedule "A" hereto attached, all in accordance in all respects with those certain specifications attached hereto and designated Schedule "B", such specifications by this reference thereto being incorporated herein and made a part hereof; any of such matters or things by the specifications specifically provided to be furnished by the contractor or by the United States of America need not be furnished by the sub-contractor hereunder. The sub-contractor agrees that he will commence work under this contract within 2 days from and after the receipt by him of such written notice to proceed from the contractor, and further promises and agrees to prosecute all of his work hereunder diligently and to co-ordinate his work with the work of other persons so that the sub-contract work may be completed on or before the 15th day of April, 1948. It mutually is acknowledged that time is of the essence of this sub-contract. By virtue hereof the sub-contractor binds himself to the contractor and to the United

Exhibit "A"—(Continued)

States of America to comply fully with all of the undertakings and obligations of the contractor under the principal contract, excepting only such [62] matters as shall not apply to the sub-contractor's work hereunder as set forth in said principal contract.

2. The sub-contractor further promises and agrees to perform all of his work hereunder pursuant to, and to supply all of the materials provided for herein, to, and otherwise to be fully bound by and perform each and every of the terms, provisions and conditions as contained in the principal contract and as shall be applicable to the services to be performed and the materials to be supplied by the sub-contractor hereunder. In the event that for any reason any doubt should arise as to the applicability of any of the terms, provisions or conditions of the principal contract with respect to said services or materials to be rendered and supplied by the sub-contractor hereunder, then the conclusion of the contractor with respect to said applicability or inapplicability shall be conclusive and final.

3. The consideration for the work to be done hereunder inclusive of the services to be rendered and materials to be furnished shall be the sum of $80,000.00 (Eighty thousand and no/100 Dollars—). All of such work to be done, services to be rendered and materials to be furnished shall be in strict accordance with the specification, schedules and drawings applicable, all of which same hereby are made

Exhibit "A"—(Continued)

a part hereof, and none of the same may be altered, changed or modified in any manner or respect without the written consent of the contractor being first had and obtained. The aforementioned consideration shall be paid to the sub-contractor upon invoices and vouchers surrendered therefor, in such manner and form as shall be prescribed by the contractor, subject to the reimbursement of the contractor therefor from the United States of America. Without, in any manner or fashion, affecting the generalities of the references to the principal contract and the agreements of the sub-contractor hereunder to be bound thereby, payments shall be made by the contractor to the sub-contractor only in accordance with the reimbursement of the contractor under and pursuant to the terms, provisions and conditions of Article 16 of the principal contract; and the sub-contractor promises and agrees to cooperate with the contractor and to make, execute and deliver such instruments, vouchers and documents, inclusive of releases, as may be required by the contractor for compliance with the provisions of said Article 16.

4. As a condition precedent to the granting of this sub-contract to the sub-contractor, and in order to induce the principal contractor to make and enter into the same, with respect to the work provided to be done by the sub-contractor hereunder, the sub-contractor agrees to furnish to and deposit with the principal contractor, concurrently with the signing of this contract, a performance bond to the extent of fifty per cent of the contract price as specified

Exhibit "A"—(Continued)

in Paragraph 3 hereof above and also a payment bond likewise to the extent of fifty per cent of said contract price, each with good and sufficient surety or sureties satisfactory to the principal contractor. Should any surety upon any bond furnished in connection with the sub-contract become unacceptable to the principal contractor, or if any such surety shall fail to furnish reports as to its or his financial condition from time to time as requested by the principal contractor, then the sub-contractor must promptly furnish such additional security as may be required from time to time to protect the interest of the principal contractor or of the Government of the United States of America, or of any person supplying labor or materials in the prosecution of the work contemplated by the sub-contractor.

5. Subject to the approval of the United States of America through its duly authorized representatives with respect to said principal contract, or at the request or direction of said United States of America, or its duly authorized representatives, the contractor, by written order, may change the extent or [63] amount of the work covered and to be covered by this sub-contract, but if any such change causes a material increase or decrease in the amount or character of such work, the contractor will make such equitable adjustment as may be authorized and approved by the United States of America of and in connection with the consideration and payments to be made to the sub-contractor hereunder. In the event that the contractor and sub-contractor

Exhibit "A"—(Continued)

shall fail to agree upon any such equitable adjustment as aforesaid, then without the stoppage of any work by the sub-contractor hereunder the dispute shall be determined as provided by the terms, provisions and conditions contained in the principal contract, as applied to the circumstances of the dispute between the sub-contractor and the contractor accordingly. In the event that this sub-contract is terminated before the work provided for hereby shall be completed, the sub-contractor shall be reimbursed in the manner herein and under the principal contract provided, but subject to all of the other terms, provisions and conditions contained in the principal contract as applicable hereunder.

6. It specifically is understood and agreed that the interpretation and construction of all of the terms, provisions, and conditions contained in this sub-contract shall be subject to the interpretation and construction of the principal contract and all such interpretations and constructions of the principal contract shall be fully binding upon each of the parties hereto.

7. All alterations, modifications and changes of the within subcontract are recited and referred to in Schedule "C" hereto attached; in the event that no such Schedule "C" shall be so attached then the word "none" will be written following this paragraph to indicate that there have been no alterations, changes or modifications of the within subcontract.

Exhibit "A"—(Continued)

In Witness Whereof, the parties hereto have executed this sub-contract at the place and upon the date first hereinabove written.

WM. RADKOVICH COMPANY, INC.

/s/ By WM. RADKOVICH,
President

Witnesses to Signature of Contractor: Signed Eugene H. Parks.

/s/ E. B. WOOLLEY,
Sub-Contractor
By Owner

Witnesses to Signature of Sub-Contractor: Signed M. V. Colling.

Schedule "A"

(Sub-Contract of E. B. Woolley; dated July 30, 1947.)

The description of the work to be done hereunder is as follows:

See Section 15-01 "Scope" of Specifications for Temporary Family Quarters Job No. Muroc AAF 7-210-2 at Muroc Army Air Field, Muroc, California. [64]

Schedule "B"

(Sub-Contract of E. B. Woolley; dated July 30, 1947.)

The specifications applicable to the work to be done hereunder are as follows:

Specifications for Temporary Family Quarters Job No. Muroc AAF 7-210-2 at Muroc Army Air

Exhibit "A"—(Continued)

Field, Muroc, Calif. Section 15 Paragraphs 15-01 through 15-26.

Schedule "C"

The alterations, changes and modifications of the sub-contract of E. B. Woolley dated July 30, 1947 to which this Schedule is attached are as follows: None. [65]

EXHIBIT "B"

[Letterhead of Glens Falls Indemnity Company]

Bond No. 320853

PAYMENT BOND

Know All Men By These Presents, That we, E. B. Woolley, as Principal, and Glens Falls Indemnity Company, a New York corporation of Glens Falls, New York, as Surety, are held and firmly bound unto Wm. Radkovich Company, Inc., hereinafter called the Obligee, in the penal sum of Forty Thousand ($40,000.00) for the payment of which sum well and truly be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the said Obligee entered into a certain contract with the United States of America, per the War Department dated June 19, 1947, for construction contract, War Department.

Whereas, said Principal on the 30th day of July, 1947, entered into a written subcontract agreement

Exhibit "B"—(Continued)

with Wm. Radkovich Company, Inc., for Electrical wiring of 100 homes, see section 15-01 "Scope" of specifications for temporary family quarters Job No. Muroc AAF 7-210-2 at Muroc Army Air Field, Muroc, California.

Now, Therefore, If the Above Principal shall indemnify and hold the said Obligee free and harmless from and against all loss and damage by reason of its failure to promptly pay to all persons supplying labor and materials used in the prosecution of the work provided for in said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect.

Signed and Sealed this 6th day of August, 1947.

E. B. WOOLLEY,
Principal
GLENS FALLS INDEMNITY COMPANY

By .....
Attorney

Refer to Performance Bond for charge for both bonds. [66]

PERFORMANCE BOND

Know All Men By These Presents, That we E. B. Woolley, as Principal, and Glens Falls Indemnity Company, a New York Corporation, of Glens Falls, New York, as Surety, are held and firmly bound unto Wm. Radkovich Company, Inc., hereinafter

Exhibit "B"—(Continued)

called the Obligee, in the penal sum of Forty Thousand ($40,000.00) for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the said Obligee entered into a certain contract with United States of America, per the War Department, dated June 19, 1947, for construction contract, War Department, contract No. W-04-353-eng-2050.

Whereas, said Principal on the 30th day of July, 1947 entered into a written sub-contract agreement with Wm. Radkovich Company, Inc., Obligee, for Electrical wiring of 100 homes, see section 15-01, "Scope" of specifications for temporary family quarters Job No. Muroc AAF 7-210-2 at Muroc Army Air Field, Muroc, California.

Now, Therefore, if the Principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the with or without notice to the Surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made notice of which modifications to the Surety being hereby waived, then, this obliga-

Exhibit "B"—(Continued)

iton to be void; otherwise to remain in full force and virtue.

This Bond Is Executed Upon the Following Conditions Precedent to the Right to Recover Hereunder:

The Obligee shall keep, do and perform each and every of the matters and things set forth and specified in said subcontract, to be by the Obligee kept, done or performed at the times and in the manner as in said contract specified:

The said Surety shall be notified in writing of any act on the part of said Principal, or its agents or employees, which may involve a loss for which the said Surety is responsible hereunder, immediately after the occurrence of such act shall have come to the knowledge of said Obligee, or any representative duly authorized to oversee the performance of said subcontract, and a registered letter mailed to the said Surety, at its principal office in the city of Glens Falls, state of New York, or its Pacific Coast Department in the city of San Francisco, state of California; shall be the notice required within the meaning of this bond:

If the said Principal shall abandon said subcontract, or be compelled by the owner to cease operations thereunder, then the Surety shall have the right, in its option, to assume the said subcontract and to sublet or complete the same; and if said subcontract shall be assumed by the Surety, any reserve, deferred payments and all other moneys provided by said subcontract to be paid to the Principal,

Exhibit "B"—(Continued)

shall be paid to the Surety and under the same conditions as by the terms thereof, such moneys would have been paid to the Principal had the subcontract been duly performed by the Principal. And if said Obligee shall complete or relet the said subcontract, then any forfeitures provided in said subcontract against the Principal, shall not be operative as against the Surety, but all reserves, deferred payments [67] and all other moneys provided in said subcontract, which would have been paid to the Principal had the Principal completed the subcontract in accordance with its terms, shall be paid to the Surety;

The Surety shall not be liable for any damages resulting from an Act of God, or from a mob, riot, civil commotion or a public enemy; or from so-called "strikes" or labor difficulties; or from accident, fire, lightning, tornado or cyclone, and the Surety shall not be liable for the reconstruction or repair of any work or materials damaged or destroyed by said causes or any of them;

This bond does not cover any provisions of the subcontract or specifications respecting guarantees of efficiency or wearing qualities or for maintenance or repairs nor does it obligate the Surety to furnish any other bond covering such provisions of the subcontract or specifications.

No right of action shall accrue under this bond to or for the use of any person other than the Obligee named herein.

That any suit brought on this bond must be in-

Exhibit "B"—(Continued)

stituted within one (1) year from the completion of the work under the subcontract herein mentioned.

Signed and Sealed this 6th day of August, 1947.

.....
Principal
GLENS FALLS INDEMNITY COMPANY,
/s/ By M. KLOTZ,
Attorney

The rate of premium on this bond is $7.50 per thousand. Total amount of premium charged: $600.

State of California,
County of Los Angeles—ss.

On this 6th day of August in the year One Thousand Nine Hundred and forty-seven before me, Harry Leonard, a Notary Public in and for the said County of Los Angeles, residing therein, duly commissioned and sworn, personally appeared M. Klotz, known to me to be the Attorney of the Glens Falls Indemnity Company, the Corporation that executed the within instrument, and known to me to be the person who executed the said instrument on behalf of the Corporation therein named and acknowledged to me that such Corporation executed the same.

In Witness Whereof I have hereunto set my hand

Exhibit "B"—(Continued)

and affixed my official seal in the County of Los Angeles, the day and year in this certificate first above written.

[Seal] /s/ HARRY LEONARD,

Notary Public in and for the County of Los Angeles, State of California. My commission expires Nov. 15, 1948. [68]

Acknowledgment of Service attached. [69]

[Endorsed]: Filed Aug. 29, 1949.

[Title of District Court and Cause.]

ANSWER OF CROSS-DEFENDANT, E. B. WOOLLEY, TO CROSS-CLAIM

Cross-Defendant, E. B. Woolley, answering for himself alone and not for his co-cross-defendant, admits, denies and alleges as follows:

I.

Answering Paragraph IX of said Cross-Claim, this cross-defendant admits that cross-claimant, Wm. Radkovich Company, Inc., [70] entered upon the performance of its general contract therein mentioned and thereafter completed said contract and in the performance of said work, made and entered into a contract with this cross-defendant, dated July 30, 1947, called a sub-contract, wherein and whereby it was provided that this cross-defendant should perform a certain portion of the work

embraced within the general contract or prime contract thereinbefore in said cross-claim referred to, for a payment to this cross-defendant of $80,000.00, but denies that the amount of work embraced in said sub-contract included within its scope the furnishing and/or installation of all electrical installations on said job and, in this connection, alleges that the scope of the work embraced in said sub-contract did not include the furnishing or installation of electrical fixtures, chime circuits, phone circuits or added closet lights on said job or any other supplies, equipment, installations or work except the supplies, equipment, installations and work set forth in said sub-contract; except as so expressly admitted, this cross-defendant denies, generally and specifically, each and every, all and singular, the allegations in said Paragraph contained and the whole thereof and denies that the price to be paid this cross-defendant under said sub-contract was subsequently or ever modified, whether in writing or by agreement or otherwise to the sum of $73,900.00, or any other sum whatsoever other than the sum of $74,490.00.

II.

Answering Paragraph X of said cross-claim, this answering cross-defendant admits that cross-defendant, Glens Falls Indemnity Company, a corporation, executed its payment bond in connection with the sub-contract between cross-claimant, Wm. Radkovich Company, Inc., and this cross-defendant, but this cross-defendant denies that said bond contained any provisions, terms or conditions other than the

provisions, terms and conditions expressly [71] set out and contained in said bond.

III.

Answering Paragraph XI of cross-claim, this answering cross-defendant admits that there is due, owing and unpaid from cross-claimant, Wm. Radkovich Company, Inc., to this cross-defendant, on account of the performance of said electrical subcontract, the sum of $16,562.54, but denies that said sum is the balance that is due or owing or unpaid from said cross-claimant to this cross-defendant and denies that no more or greater sum is so due or owing or unpaid and in this connection this cross-defendant alleges that there is due, owing and unpaid from cross-claimant, Wm. Radkovich Company, Inc., to this cross-defendant, on account of the performance of said electrical sub-contract a balance of $29,039.73, together with the sum of $8,385.53, for additional labor and materials furnished said cross-claimant, Wm. Radkovich Company, Inc., from time to time as requested by said cross-defendant, all as more particularly set forth in the first and second causes of action of the cross-claim for the benefit of this cross-defendant, to be filed concurrently herewith, together with the sum of $16,176.58, for damages as set forth in the third cause of action of said cross-claim.

Wherefore, this cross-defendant prays that cross-claimant, Wm. Radkovich Company, Inc., take nothing by reason of its cross-claim on file herein and

that this cross-defendant be given the relief prayed for in the cross-claim for his benefit filed concurrently herewith and for such other and further relief as to the Court may seem meet and just.

/s/ FRANK M. BENEDICT,
Attorney for Cross-Defendant,
E. B. Woolley [72]

Affidavit of Service by Mail attached. [73]

[Endorsed]: Filed Sept. 2, 1949.

In the District Court of the United States, Southern District of California, Central Division

No. 9303-Y

UNITED STATES OF AMERICA, et al.,
Plaintiff,

vs.

WM. RADKOVICH COMPANY, INC., et al.,
Defendants.

WM. RADKOVICH COMPANY, INC., et al.,
Cross-Claimants,

vs.

E. B. WOOLLEY and GLENS FALLS INDEMNITY COMPANY, a corporation,
Cross-Defendants.

UNITED STATES OF AMERICA, at the Relation of and to the Use of E. B. WOOLLEY,
Cross-Claimant,

vs.

WM. RADKOVICH COMPANY, INC., a corporation, UNITED PACIFIC INSURANCE COMPANY, a corporation, GENERAL CASUALTY COMPANY OF AMERICA, a corporation, EXCESS INSURANCE COMPANY OF AMERICA, a corporation, and MANUFACTURERS' CASUALTY COMPANY, a corporation,
Cross-Defendants.

CROSS-CLAIM

Upon Bond and Against Contractor for Materials and Labor Upon Government Contract

I.

Cross-claimant avers that E. B. Woolley, for whose benefit [74] this action is brought, is a sub-

contractor who furnished labor and materials in the prosecution of the work provided in a certain contract entered into between cross-defendant, Wm. Radkovich Company, Inc., a corporation, as general contractor, and the United States of America, dated the 19th day of June, 1947, for the construction of public works within the meaning of the Act of Congress of August 24, 1935 (49 Statutes 793), being the Federal Public Works Bond Act, commonly known as the "Miller Act."

II.

That the cross-defendant Wm. Radkovich Company, Inc., is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of California, with an office and its principal place of business in the County of Los Angeles, State of California, and at all times herein mentioned was and now is a duly licensed contractor in the State of California.

III.

That cross-defendant United Pacific Insurance Company is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Washington, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said State and to do business therein.

IV.

That cross-defendant General Casualty Company of America is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Washington, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized [75] to write such surety bonds and to do business therein.

V.

That cross-defendant Excess Insurance Company of America is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York, and authorized by law to engage in the business of writing surety bonds, and having by virtue of compliance with the laws of the State of California become authorized to write such surety bonds in said state and to do business therein.

VI.

That cross-defendant Manufacturers' Casualty Insurance Company is now and at all times herein mentioned was a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, and authorized by law to engage in the business of writing surety bonds, and having by virtue of the compliance with the laws of the State of California become author-

ized to write such surety bonds in said State and do business therein.

VII.

That pursuant to a printed invitation for bids given by the War Department of the United States of America, the cross-defendant, Wm. Radkovich Company, Inc., submitted its bid and was awarded the contract for the performance of all the work required for the construction of Temporary Family Quarters, Job No. Muroc AAF 7-210-2, at Muroc Army Air Field, Muroc, California, in accordance with the plans and specifications for the construction of said work.

That the contract so awarded was made and executed and bears date of June 19, 1947; that by the terms of said building contract, it was provided that said cross-defendant, Wm. Radkovich Company, Inc., should erect and construct the improvements [76] above referred to as the prime contractor for the United States of America as owner, at Muroc, California, for an estimated contract price of $749,-999.50, as required by the plans and specifications referred to in said contract.

VIII.

That for the valuable and adequate considerations, moving severally to the cross-defendants-Surety Companies next named, the United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a

corporation, severally made, executed and delivered, and the said companies caused to be filed with the proper government officials a certain Standard Form of Payment Bond, pursuant to said Act of Congress approved August 24, 1935, (49 Statutes 793), whereby in the aggregate said four cross-defendants-Surety Companies bound themselves as sureties for said cross-defendant Wm. Radkovich Company, Inc., a corporation, unto the United States of America in the aggregate penal sum of $374,999.75, and wherein in said bond it is recited that said sureties, while being bound firmly by said bond jointly and severally, are bound under the terms of the following proviso:

"Provided, That we Sureties bind ourselves in such sum 'jointly and severally' as well as 'severally' only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each Surety binds itself, jointly and severally with the principal, for the payment of such sum only as is set forth opposite its name in the following schedule", in which schedule the respective limits of liability for said respective four defendant-Surety Companies is set forth as $93,749.94, and in which bond, subject to the proviso above set forth, it is agreed that if the principal should faithfully perform its contract and all of its terms, covenants and conditions, [77] and should promptly pay to all persons supplying the principal with labor and materials in the prosecution of the work in the contract provided, then the obligation is to be void; otherwise it shall remain in full force and effect.

That said bond is and at all times since the execution and delivery thereof as aforesaid, has been in full force and effect; that the cross-defendant Wm. Radkovich Company, Inc., joined in the execution of said bond as principal.

IX.

That thereafter the said cross-defendant, Wm. Radkovich Company, Inc., entered upon the performance of said contract and thereafter completed said contract, and in the performance of said work made and entered into a contract with the said E. B. Woolley, dated July 30, 1947, called a subcontract, wherein and whereby it was provided that the said E. B. Woolley should perform a certain portion of the work embraced within said general contract or prime contract consisting of the furnishing by the said E. B. Woolley of all labor, equipment, supplies and materials, (except equipment designated to be furnished by the Government) including pilot lamps, and performing all operations necessary for the installation of complete interior wiring systems, duct systems, and electric service connections in strict accordance with Section 15 of the specifications referred to in said prime contract and in the applicable drawings, and subject to the terms and conditions of said prime contract and cross-defendant, Wm. Radkovich Company, Inc., agreed to pay the said E. B. Woolley therefor the sum of $80,000.00, subsequently reduced in amount to the sum of $74,490.00 because of the deletion from said sub-

contract of the furnishing by said E. B. Woolley of electric water heaters.

X.

That thereafter and in pursuance of said subcontract, the said E. B. Woolley furnished all labor, equipment, supplies and [78] materials and performed all operations necessary for the installation of complete wiring systems, duct systems and electric service connections called for in said subcontract and that all of said materials and labor were furnished to be used and were actually used in and about the construction of said improvements, above mentioned.

XI.

That in addition thereto and at the special instance and request of cross-defendant, Wm. Radkovich Company, Inc., the said E. B. Woolley furnished additional labor and materials from time to time as requested by said cross-defendant, of the reasonable value of $8,385.53, and that said additional labor and materials were furnished to be used and were actually used in and about the erection and construction of said improvements, and that the said price of $8,385.53 was and now is the reasonable value of said materials and labor then prevailing.

XII.

That no part of said sum of $74,490.00 referred to in Paragraph IX hereof and no part of said sum of $8,385.53 referred to in Paragraph XI hereof,

making a total sum of $82,875.53, has been paid, except the sum of $45,450.27, and there is now due, owing and unpaid from said cross-defendant, Wm. Radkovich Company, Inc., to the said E. B. Woolley the sum of $37,425.26.

XIII.

That the War Department of the United States of America was duly authorized and empowered by law to undertake the construction of said buildings and improvements and that the same were undertaken and built upon land owned by the United States of America at Muroc, California.

XIV.

That said subcontract has been fully performed on the part of the said E. B. Woolley and that the furnishing of all labor, [79] equipment, supplies and materials, wiring systems, duct systems, and electrical service connections called for in said subcontract was completed by the said E. B. Woolley on the 6th day of October, 1948, and that more than 90 days have elapsed from the date of the furnishing of the last thereof and that this action is being filed before the expiration of one year after the date of final settlement of said prime contract.

XV.

That at all times mentioned in this cross-claim, and at all times during the performance of each act and of the sub-contract herein mentioned, the said

E. B. Woolley was, and now is, a duly licensed electrical contractor.

For a Further, Separate and Second Cause of Action, Cross-Claimant Avers:

I.

Cross-claimant incorporates herein by reference the allegations contained in Paragraphs I, II, III, IV, V, VI, VII, VIII, XIII and XV of its first cause of action with the same force and effect as though the same were set out in full herein.

II.

That between the 8th day of August, 1947, and the 6th day of October, 1948, at the special instance and request of cross-defendant, Wm. Radkovich Company, Inc., and upon its promise to pay the reasonable value thereof, the said E. B. Woolley furnished certain electrical equipment, supplies and materials and labor to install the same on said work of improvement above mentioned and that the current market price and reasonable value of the said equipment, supplies, materials and labor was the sum of $82,875.53; that no part thereof has been paid except the sum of $45,450.27 and that the balance thereof, to wit: The sum of $37,425.26, is now due, owing and unpaid; that all of said electrical equipment, supplies, materials and labor were furnished to be used and were [80] actually used in the performance of said work of improvement and in

connection with the performance of said prime con tract.

For a Further Separate and Third Cause of Ac tion, Cross-Complaint Avers:

I.

Cross-claimant incorporates herein by referenc the allegations contained in Paragraphs I, II, III IV, V, VI, VII, VIII, IX, and X of its first caus of action with the same force and effect as thoug the same were set out in full herein.

II.

That by the terms of said subcontract, it was pro vided that the said E. B. Woolley would commenc work thereunder within two days from and afte the receipt by him from cross-defendant, Wm. Rad kovich Company, Inc., of written notice to proce and would prosecute all of his work thereunde diligently and coordinate his work with the wor of other persons so that the subcontract work woul be completed on or before the 15th day of Apri 1948, and that cross-defendant, Wm. Radkovic Company, Inc., would permit said E. B. Woolle to proceed with the prosecution of the said E. B Woolley's work under said subcontract and woul have said buildings and improvements ready and i condition so that said E. B. Woolley could prosecut without delay, his work thereunder so that said E B. Woolley could complete said subcontract wor on or before the 15th day of April, 1948; that o

or about the 8th day of August, 1947, the said E. B. Woolley received written notice to proceed under said subcontract from said cross-defendant, Wm. Radkovich Company, Inc., and was thereafter instructed by said Wm. Radkovich Company, Inc., to commence work under said subcontract on September 1, 1947.

III.

That although the said E. B. Woolley was ready, willing and able to commence work under said subcontract and enter upon [81] the performance thereof on September 1, 1947, as instructed by said cross-defendant, Wm. Radkovich Company, Inc., he was prevented from so doing by said cross-defendant due to the failure, neglect and refusal of said cross-defendant to permit the said E. B. Woolley to proceed with the prosecution of the said E. B. Woolley's work under said subcontract and to have said work of improvement ready and in condition so that the said E. B. Woolley could proceed with his work under said subcontract; that from the said September 1, 1947, to October 6, 1947, said E. B. Woolley continued to be and was ready, willing and able to commence work under said subcontract and enter upon the performance thereof but due to such failure, neglect and refusal of said cross-defendant, Wm. Radkovich Company, Inc., was prevented from doing so until said last mentioned date, to the damage of the said E. B. Woolley in the sum of $1,149.22.

IV.

That thereafter said E. B. Woolley was ready,

willing and able to prosecute all of his work under said subcontract diligently and coordinate his work with the work of other persons so that said subcontract work would have been completed on or before the 15th day of April, 1948, but was prevented from so doing by said cross-defendant, Wm. Radkovich Company, Inc., due to the repeated failure, neglect and refusal of said cross-defendant to permit said E. B. Woolley to proceed with the prosecution of the said E. B. Woolley's work under said subcontract and to have said buildings and improvements ready and in condition so that the said E. B. Woolley could prosecute without delay his work under said subcontract, with the result that said E. B. Woolley was prevented from completing said subcontract work until October 6, 1948, to the further damage of said E. B. Woolley in the sum of $15,027.36. [82]

V.

Cross-claimant incorporates herein by reference the allegations contained in Paragraphs XIII, XIV and XV of its first cause of action with the same force and effect as though the same were set out in full herein.

Wherefore, the United States of America at the relation of and to the use of said E. B. Woolley cross-claimant herein, prays judgment against the cross-defendants as follows:

1. Against the cross-defendant, Wm. Radkovich Company, Inc., for the sum of $53,601.84, plus interest on the sum of $37,425.26 from the 15th day

of April, 1948, and interest on the sum of $16,176.58, from the 6th day of October, 1948, at the rate of 7% per annum until paid;

2. Against the cross-defendants, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation, and each of them, jointly and severally, in a like sum as is prayed against their principal, Wm. Radkovich Company, Inc.;

3. For cross-claimant's costs of suit in this action expended; and

4. For such other and further relief as to the Court may seem meet and proper and consistent with equity.

/s/ FRANK M. BENEDICT,
Attorney for Cross-Claimant [83]

Affidavit of Service by Mail attached. [84]

[Endorsed]: Filed Sept. 7, 1949.

[Title of District Court and Cause.]

ANSWER OF CROSS-DEFENDANT WM. RADKOVICH COMPANY, INC., TO CROSS-CLAIM OF UNITED STATES OF AMERICA

Comes now Wm. Radkovich Company, Inc., a corporation, one of the [86] cross-defendants, and answering for itself alone and not for its co-cross-defendants the cross-claim of United States of

America, at the Relation and to the Use of E. B Woolley, admits, denies and alleges as follows:

I.

Admits the allegations in paragraphs numbered I, II, III, IV, V, VI, VII and VIII.

II.

Admits the averments in paragraph IX, except that this cross-defendant alleges that said electric subcontract referred to therein, by its terms as subsequently modified and agreed to by cross-claimant E. B. Woolley, and this cross-defendant, provided for payment to said cross-omplainant of the aggregate sum of $73,900.00 because of the elimination from said subcontract of the furnishing by said E. B. Woolley of electric water heaters in the amount of $6,100.00, which was the amount for said item specified by the general contract.

III.

Denies the averments in paragraph numbered X and alleges on the contrary that cross-defendant Wm. Radkovich Company, Inc., a corporation, was compelled, at its own expense, to furnish labor and materials to the amount of $7,887.09 to complete said subcontract upon the refusal, neglect and failure of said E. B. Woolley to complete said subcontract.

IV.

Denies the averments in paragraph XI.

V.

Answering the averments in paragraph numbered XII this cross-defendant denies that there is any sum whatsoever due, owing and unpaid, or due or owing or unpaid, from said cross-defendant to said E. B. Woolley, except the sum of $16,562.64, and alleges that the payment of said sum by this cross-defendant to cross-claimant has been prevented by the filing of liens and claims on behalf of furnishers of material to said cross-complainant in connection with the work performed by said cross-complainant under said subcontract. [87]

VI.

Admits the allegation in paragraph numbered XIII.

VII.

Denies the averments in paragraph XIV, except that this cross-defendant admits that more than ninety days have elapsed since cross-complainant furnished any labor or material upon said job.

VIII.

Admits the averments in paragraph numbered XV.

Answering the Second Cause of Action of Said Cross-Claim:

I.

Cross-defendants incorporates herein by reference its answers to paragraphs numbered I, II, III, IV, V, VI, VII, VIII, XIII and XV of the first

cause of action with the same force and effect
though the same were set out in full herein.

II.

Denies the averments in paragraph II of sa
second cause of action, except that it admits th
cross-complainant furnished certain electric equi
ment, supplies, materials and labor between the 8
day of August, 1948, and the 6th day of Octobe
1948, pursuant to a subcontract entered into b
tween cross-defendant and cross-complainant und
date of July 30, 1947, and admits that there is
balance owing on said subcontract to the cross-co
plainant of the sum of $16,562.64 which the cros
defendant avers it is ready, willing and able to pa
upon the withdrawal and satisfaction of clain
against this cross-defendant filed on behalf of pe
sons claiming to have supplied cross-complainar
with labor and materials in the prosecution of wo
under said subcontract.

Answering the Third Cause of Action of Sa
Cross-Claim:

I.

Said cross-defendant refers to and adopts its a
swers to paragraphs I, II, III, IV, V, VI, VI
VIII, IX and X of the first cause of action wi
the same force and effect as though the same we
set out in full herein. [88]

II.

Answering the averments in paragraph II cros

efendant denies that said subcontract contained ny provisions or conditions as alleged in paragraph I, or otherwise, except the terms and conditions pecifically set forth in said subcontract, a copy of hich is attached hereto, marked Exhibit "A" and ade a part hereof, and cross-defendant denies enerally and specifically, each and every other al- gation in paragraph II.

III.

Denies the averments in paragraphs numbered II and IV.

IV.

Answering the averments in paragraph V of the ird cause of action of said cross-claim cross-de- ndant refers to and adopts its answers to para- raphs XIII, XIV and XV of the first cause of tion with the same force and effect as though the me were set out in full herein.

For a Second Defense to Said Cross-Claim Cross- efendant Avers:

I.

That all labor and material furnished by said oss-complainant for which the cross-complainant w seeks recovery as for additional labor and aterials were in fact provided to be furnished by id cross-complainant as subcontractor under the rms and conditions of the subcontract entered to between cross-defendant and cross-complainant nder date of June 30, 1947, and the specifications the principal contract entered into between cross-

defendant and United States of America and e
pressly made a part of the subcontract entered in
between cross-defendant and cross-complainant a
under which said cross-complainant furnished sa
labor and material.

Wherefore, cross-defendant prays that the cro
complainant take nothing by his said cross-cla
and that it be awarded judgment for its costs here
incurred, and for such other and further relief
herein may seem proper.

ANDERSON, McPHARLIN
& CONNERS,
/s/ By ELDON V. McPHARLIN,
Attorneys for Cross-Defendant [8

[Printer's Note: Attached Exhibit "A"
a duplicate of Exhibit "A" set out in full
pages 42 to 49 of this printed Record.]

Affidavit of Service by Mail attached. [94]

[Endorsed]: Filed Oct. 18, 1949.

[Title of District Court and Cause.]

ANSWER OF CROSS-DEFENDANTS UNITE
PACIFIC INSURANCE COMPANY, ET A
TO CROSS-CLAIM.

Come now United Pacific Insurance Company,
Corporation, [95] General Casualty Company
America, a Corporation, Excess Insurance Compa

f America, a Corporation, and Manufacturers' asualty Insurance Company, a Corporation, cross-efendants, and answering for themselves the cross-aim of E. B. Woolley on file herein, admit, deny nd allege as follows:

I.

Answering paragraph I of the cross-claim these ross-defendants are without knowledge or infor-ation sufficient to form a belief as to the truth of ie averments in said paragraph.

II.

Admit the averments in paragraphs numbered II, II, IV, V, VI, VII and VIII.

III.

Admit the averments in paragraph IX, except at these cross-defendants allege on information nd belief that said electric subcontract referred therein, by its terms as subsequently modified nd agreed to by cross-defendant Wm. Radkovich ompany, Inc., and cross-complainant E. B. Wool-y, provided for payment to said cross-complainant the aggregate sum of $73,900.00 instead of the m of $74,490.00 as alleged in said paragraph.

IV.

That these cross-defendants are without knowl-ge or information sufficient to form a belief as the truth of the averments in paragraphs num-red X, XI and XII.

V.

Admit the allegations in paragraph number XIII.

VI.

That these cross-defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraphs numbered XIV and XV.

For Answer to the Separate and Second Cause of Action of Said Cross Claim: [96]

I.

Cross-defendants incorporate herein by reference their answers to paragraphs I, II, III, IV, V, VI, VII, VIII, XIII and XV of the first cause of action with the same force and effect as though the same were set out in full herein.

II.

That these cross-defendants are without knowledge or information sufficient to form a belief as to the truth of the averments in paragraph numbered II of the second cause of action of said cross claim.

Answering the Third Cause of Action of Said Cross-Claim:

I.

Cross-defendants incorporate herein by reference their answers to paragraphs I, II, III, IV, V, VI, VII, VIII, IX and X of the first cause of action

said cross-claim with the same force and effect though the same were set out in full herein.

II.

That these cross-defendants are without knowl-ge or information sufficient to form a belief as to e truth of the averments of paragraphs numbered , III and IV of the third cause of action of said oss-claim.

III.

Cross-defendants incorporate herein by reference eir answers to paragraphs XIII, XIV and XV of e first cause of action of said cross-claim with e same force and effect as though the same were t out in full herein.

For a Further and Separate Defense These Cross-efendants Allege:

I.

That the bond severally executed by them as rety for said Wm. Radkovich Company, Inc., a rporation, and referred to in paragraph VIII of e first cause of action of said cross-claim was a andard form of payment bond pursuant to the ct of Congress approved August 24, 1935, (49 tatutes, 793) and is not by its terms and conditions the part of cross-defendants to be performed able for losses, if any, sustained because of breach contract by [97] cross-defendant Wm. Radkovich ompany, Inc., causing delays and that if the cross-mplainant sustained damages as in his third

cause of action averred, that the same are whol
without the terms of cross-defendants' said bond.

Wherefore, cross-defendants pray that cross-co
plainant take nothing by his said cross-claim a
that these cross-defendants be awarded judgme
for their costs herein incurred and for such oth
and further relief as may appear proper.

ANDERSON, McPHARLIN
& CONNERS,
/s/ By ELDON V. McPHARLIN,
Attorneys for Cross-Defendants [9

Affidavit of Service by Mail attached. [99]

[Endorsed]: Filed Oct. 18, 1949.

[Title of District Court and Cause.]

STIPULATION FOR FILING SUPPLEMEN AND AMENDMENT TO CROSS-CLAIM AND ORDER THEREON

It is Hereby Stipulated by and between the pa
ties to the above entitled action, through their r
spective attorneys, that the supplement and amen
ment to the cross-claim of the United States
America, at the relation of and to the use of E.
Woolley, may be filed herein and the Court m
make its order permitting such filing forthwith, a
without further notice to any of the parties, recei
of a copy of which supplement and amendme

ing hereby acknowledged as having been made on e parties concerned this 27th day of July, 1950.

Dated: July 27, 1950.

ANDERSON, McPHARLIN
& CONNERS,

/s/ By ELDON V. McPHARLIN,
Attorneys for Wm. Radkovich
Company, Inc., and its sureties.

JOHN E. McCALL and
HAROLD J. DECKER,

/s/ By JOHN E. McCALL,
Attorneys for Glens Falls Indemnity Company

/s/ JOHN M. BENEDICT,
Attorney for E. B. Woolley

It Is So Ordered. Aug. 3, 1950.

/s/ JACOB WEINBERGER,
Judge of the U. S. District Court.

[Endorsed]: Filed Aug. 11, 1950. [103]

[Title of District Court and Cause.]

SUPPLEMENT AND AMENDMENT TO CROSS-CLAIM

Pursuant to the order of the Court permittin the filing of this supplement and amendment the cross-claim of the United States of America, the relation of and to the use of E. B. Woolle cross-claimant in the above entitled action, the fo lowing numbered paragraphs of said cross-clai are hereby amended to read as follows:

First Cause of Action:

XII.

That no part of said sum of $74,490.00 referre to in Paragraph IX hereof and no part of said su of $8,385.53 referred to in Paragraph XI hereo making a total sum of $82,875.53, has been paid, e cept the sum of $68,225.84, and there is now du owing and unpaid from said cross-defendant, Wm Radkovich Company, Inc., to [105] the said E. B Woolley the sum of $14,649.69.

Second Cause of Action:

II.

That between the 8th day of August, 1947, an the 6th day of October, 1948, at the special instanc and request of cross-defendant Wm. Radkovic Company, Inc., and upon its promise to pay the rea sonable value thereof, the said E. B. Woolley fu nished certain electrical equipment, supplies an

aterials and labor to install the same on said ork of improvement above mentioned and that ie current market price and reasonable value of ie said equipment, supplies, materials and labor as the sum of $93,052.11; that no part thereof has een paid except the sum of $68,225.84, and that ie balance thereof, to wit: The sum of $24,826.27 now due, owing and unpaid; that all of said elec- ical equipment, supplies, materials and labor ere furnished to be used and were actually used the performance of said work of improvements nd in connection with the performance of said rime contract.

Third Cause of Action:

II.

That by the terms of said subcontract, it was rovided that the said E. B. Woolley would com- ence work thereunder within two days from and ter the receipt by him from cross-defendant, Wm. adkovich Company, Inc., of written notice to pro- ed and would prosecute all of his work there- nder diligently and coordinate his work with the ork of other persons so that the subcontract work ould be completed on or before the 15th day of pril, 1948, and that cross-defendant, Wm. Rad- ovich Company, Inc., would permit said E. B. oolley to proceed with the prosecution of the said B. Woolley's work under said subcontract and ould have said buildings and improvements ready d in condition so that said E. B. Woolley could rosecute, without delay, his work thereunder so

that said E. B. Woolley could complete said sub contract work on or before the 15th day of April 1948; that on or about the 8th day of August, 1947 the said E. B. Woolley received written notice t proceed under said subcontract from said cross defendant, Wm. Radkovich Company, Inc., an was thereafter instructed by said Wm. Radkovich Company, Inc., to commence work under said sub contract on August 28, 1947.

III.

That although the said E. B. Woolley was ready willing and able to commence work under said sub contract and enter upon the performance thereof o August 28, 1947, as instructed by said cross-de fendant, Wm. Radkovich Company, Inc., he wa prevented from so doing by said cross-defendan due to the failure, neglect and refusal of said cross defendant to permit the said E. B. Woolley to pro ceed with the prosecution of the said E. B. Wool ley's work under said subcontract and to have sai work of improvement ready and in condition so tha the said E. B. Woolley could proceed with his work under said subcontract; that from the said Augus 28, 1947, to October 1, 1947, said E. B. Woolley continued to be and was ready, willing and able t commence work under said subcontract and ente upon the performance thereof but due to such failure, neglect and refusal of said cross-defendant Wm. Radkovich Company, Inc., was prevented from doing so until said last mentioned date, to the damage of the said E. B. Woolley in the sum of $1,149.22.

IV.

That thereafter said E. B. Woolley was ready, willing and able to prosecute all of his work under said subcontract diligently and coordinate his work with the work of other persons so that said subcontract work would have been completed on or before the 15th day of April, 1948, but was prevented from so doing by said cross-defendant, Wm. Radkovich Company, Inc., due to the repeated failure, neglect and refusal of said cross-defendant to permit said E. B. Woolley to [107] proceed with the prosecution of the said E. B. Woolley's work under said subcontract and to have said buildings and improvements ready and in condition so that the said E. B. Woolley could prosecute without delay his work under said subcontract, with the result that said E. B. Woolley was prevented from completing said subcontract work until October 6, 1948, to the further damage of said E. B. Woolley in the sum of $9,027.36.

Prayer:

1. Against the cross-defendant, Wm. Radkovich Company, Inc., for the sum of $24,826.27, plus interest thereon at the rate of 7% per annum from October 6, 1948.

/s/ FRANK M. BENEDICT,
Attorney for Cross-Claimant.

[Endorsed]: Filed Aug. 11, 1950. [108]

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between counsel fo
all the parties that the Cross-Claim of Wm. Radk
vich Company, Inc., a corporation, United Pacif
Insurance Company, a corporation, General Ca
ualty Company of America, a corporation, Exce
Insurance Company of America, a corporation, an
Manufacturers' Casualty Insurance Company, a co
poration, filed April 12, 1949, may be amended b
[114] substituting the attached page 5 in the pla
and stead of page 5 of said Cross-Claim.

It is further stipulated that the Answer of Cros
Defendant Glens Falls Indemnity Company, a co
poration, filed August 29, 1949, to said Cross-Clai
be amended by substituting the attached page 2
the place and stead of page 2 of said Answer file
August 29, 1949.

It is further stipulated that the Performan
Bond No. 320853 may be filed as a part of said D
fendant's Exhibit "B".

Dated: October 27th, 1950.

ANDERSON, McPHARLIN
& CONNERS

/s/ By ELDON V. McPHARLIN,
Attorneys for Defendants and
Cross-Claimants.

/s/ FRANK M. BENEDICT,
Attorney for Cross-Claimant
E. B. Woolley.

/s/ GLEN BEHYMER,
Attorney for Plaintiff.

JOHN E. McCALL and
J. HAROLD DECKER,
/s/ By JOHN E. McCALL,
Attorneys for Glens Falls
Indemnity Company.

It is so ordered.

It is further ordered that the Clerk make the ove mentioned substitutions and additions.

Dated: October 31, 1950.

/s/ JACOB WEINBERGER,
Judge of the United States District
Court. [115]

[Page 5]

IX.

That thereafter the said cross-claimant Wm. adkovich Company, Inc., entered upon the per-rmance of its contract and thereafter completed id contract, and in the performance of said work nployed the cross-defendant E. B. Woolley as a bcontractor to perform a certain portion of the ork embraced within the general contract or prime ntract hereinbefore referred to; that said sub-ntract included within its scope the furnishing all labor and material, tools, machinery, equip-ent, facilities, supplies and services, and to do all the things more specifically set forth and de-ribed therein, all in accordance in all respect with

the certain specifications attached thereto, and including within its scope the furnishing and installation of and payment for all electrical installations on said job as the electrical subcontractor for an agreed cost of $80,000.00, subsequently modified in writing by agreement between said cross-claimant Wm. Radkovich Company, Inc., and said E. B. Woolley to the sum of $73,900.00.

X.

That for a valuable and adequate consideration moving to cross-defendant Glens Falls Indemnity Company, a corporation, said Glens Falls Indemnity Company executed and delivered and caused to be filed with cross-claimant Wm. Radkovich Company, Inc., a certain payment bond whereby said Glens Falls Indemnity Company bound itself, as surety for said cross-defendant E. B. Woolley, unto cross-claimant Wm. Radkovich Company, Inc., in the aggregate sum of $40,000.00, and in which bond it is agreed that if the principal shall indemnify and hold the said obligee free and harmless from and against all loss and damage by reason of its failure to promptly pay all persons supplying labor and materials used in the prosecution of the work provided for in said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect.

That for a valuable and adequate consideration moving to cross-defendant [116] Glens Falls Indemnity Company, a corporation, said Glens Falls Indemnity Company executed and delivered and

caused to be filed with cross-claimant Wm. Radkovich Company, Inc., a certain performance bond whereby said Glens Falls Indemnity Company bound itself as surety for said cross-defendant E. B. Woolley unto cross-claimant Wm. Radkovich Company, Inc., in the aggregate sum of $40,000.00, the condition of said bond being that if the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the

with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

XI.

That thereafter, the said E. B. Woolley entered upon the performance of his contract and in the performance of said work furnished and [117]

[Page 2]

the general contractor, Wm. Radkovich Company, Inc., by and through its President, Wm. Radkovich, and E. B. Woolley, as subcontractor, on or about the 30th day of July, 1947, but denies that said

subcontract contained any provisions or condition as alleged in paragraph IX, or otherwise, excep the terms and conditions specifically set forth i said subcontract, a copy of which is attached here marked Exhibit "A", and denies generally an specifically each and every other allegation in para graph IX contained.

II.

Answering paragraph X of said Cross-Clain this defendant admits that on or about the 6th da of August, 1947, it executed and delivered a Pay ment Bond and a Performance Bond, wherein E. I Woolley was named as Principal, this defendan was named as Surety, and Wm. Radkovich Com pany, Inc. was named as Obligee, and that the pena sum of each bond was $40,000.00, but defendant de nies generally and specifically that said bonds con tained any terms or conditions, as alleged in para graph X, or otherwise, except such terms and con ditions as are specifically set out in said bond copies of which are attached hereto as Exhibit "B and made a part hereof by this reference.

III.

Answering the allegations contained in paragrap XI, this defendant admits that subcontractor E. I Woolley entered upon the performance of said sub contract, and that there is due subcontractor E. I Woolley $16,562.54 under said subcontract, and tha claim has been made against cross-claimants fo certain electrical equipment, supplies and material which said Westinghouse Electric Supply Compan

as alleged that it sold to said E. B. Woolley for se in the performance of his said subcontract, a opy of which is attached hereto as Exhibit "A". This defendant has no information or belief sufcient to enable it to answer any of the other alegations contained in paragraph XI, and, placing s denial on that ground, denies that there [118]

[Endorsed]: Filed Nov. 1, 1950.

Title of District Court and Cause.]

MEMORANDUM OF CONCLUSIONS

Judge Jacob Weinberger, September ..., 1951.

Appearances: Glen Behymer, Esq., for plaintiff. nderson, McPharlin & Conners, Esqs., for Wm. adkovich Co. and sureties. Frank M. Benedict, sq., for E. B. Woolley. John E. McCall, Esq., and larold J. Decker, Esq., for Glen Falls Indemnity ompany. [119]

On June 19, 1947, defendant Wm. Radkovich ompany, Inc., as prime contractor entered into a ntract with the United States for the construction Temporary Family Quarters for the Army Air ield at Muroc, California, said quarters to consist 100 poured concrete houses of the "Le Torneau" pe, as described in said contract (Exhibit B) and e plans and specifications made a part of said conact. Defendants United Pacific Insurance Comany, General Casualty Company of America, Ex-

cess Insurance Company of America, and Manufac turers' Casualty Insurance Company (hereinafte called "Radkovich sureties") severally executed a payment bond on behalf of Radkovich Company On July 30, 1947, E. E. Woolley as electrical sub contractor entered into a subcontract (Exhibit C) with Radkovich Company for certain electrical work described in said prime contract. Glens Falls In demnity Company, a cross-defendant herein, exe cuted a performance bond and a payment bond, each in the sum of $40,000.00, on behalf of Woolley with reference to said subcontract. (Said bonds are part of Exhibit C and are attached to the subcontract).

Westinghouse Electric Supply Company fur nished certain materials of the value of $52,622.22 to Woolley, which materials were used in said con struction, and this suit is brought under the Miller Act (Sections 270a and 270b of Title 28 U.S.C.A.) against the Radkovich Company, its sureties and Woolley for the balance due Westinghouse from Woolley, to wit, $43,514.05.

Since the filing of the action, and on October 27 1949, Woolley and his surety requested Radkovich Company to pay to Westinghouse Company the sum of $16,562.54 which Radkovich admittedly owed Woolley under the latter's subcontract, and Rad kovich Company paid to Westinghouse [120] Com pany the sum of $16,562.04, leaving a balance due Westinghouse Company for materials furnished and used in said construction of the sum of $26,- 952.01. The amount last paid Westinghouse has been referred to by counsel at times as $16,562.54 and

his accounts for a small discrepancy in some of he figures.

In a cross-claim filed against Woolley and his urety, Radkovich Company and its sureties alleged hat the surety executed the performance and pay- nent bonds hereinbefore mentioned on behalf of Woolley, that the subcontract provided for the pay- nent to Woolley of the sum of $80,000.00 for work nd materials mentioned in said subcontract, that he amount mentioned in the contract had been sub- equently reduced to $73,900.00 by agreement, that he amount remaining unpaid from Radkovich un- ler said subcontract was the sum of $16,562.54, and ontained a prayer that the court adjudge the sum ast mentioned to be the total amount due Woolley nder said subcontract, and that judgment against Woolley and his surety be given Radkovich Com- pany for any sum over said last mentioned amount ound to be due Westinghouse from Radkovich Com- pany or its sureties.

Glen Falls Company, in an answer to said cross- laim, denied that the sum of $16,562.54 was the otal sum owing Woolley by Radkovich Company, nd pleaded that it should be released from liability ecause of matters stated in such surety's affirma- ime defenses 2 to 7 inclusive.

Woolley in his answer to the cross-claim of Rad- kovich Company and sureties denies the reduction f the amount to be paid under the subcontract to ny sum other than $74,490.00, makes further allega- ions similar to those more particularly set forth in cross-claim and supplement thereto filed against

Radkovich Company and its sureties. [121] These similar allegations are contained in Paragraph III of his answer, and Woolley states that Radkovich Company is indebted to him in the sum of $29,039.73 (reduced by $16,562.04 paid to Westinghouse since the filing of the action) on account of the performance of the said electrical subcontract, together with the sum of $8,385.53 for additional labor and materials furnished Radkovich Company as requested by it, all as more particularly set forth in the cross-claim filed concurrently therewith, together with the sum of $16,176.58 for damages as set forth in the third cause of action of the cross-claim; in his prayer, Woolley asks that Radkovich take nothing by his cross-claim and that Woolley be given the relief prayed for in the cross-claim and for such other relief, etc., as may be just.

In said cross-claim (which is in fact a separate suit for it is brought by the United States of America at the relation of and to the use of E. B. Woolley) Woolley set forth that he is a subcontractor who furnished labor and materials in the prosecution of the work provided for in a certain contract entered into between cross-defendant Radkovich Company as general contractor and the United States of America for the construction of public works within the meaning of the Miller Act; the filing of the bond by the Radkovich sureties is alleged, and it is stated that Woolley entered into a subcontract for furnishing labor and materials for a portion of the work embraced in the prime contract, and that Radkovich agreed to pay Woolley the sum of $80,000.00 for said

work which sum was subsequently [122] reduced to $74,490.00; that thereafter and in pursuance of said contract, Woolley furnished labor, equipment, supplies and materials and performed the work called for in said subcontract and that all the materials were furnished to be used and were actually used in and about the construction of the improvements mentioned in the prime contract.

In Paragraph XI of the cross-claim, it is alleged that at the special instance and request of Radkovich Company Woolley furnished additional labor and materials of the reasonable value of $8,385.53, and "that said additional labor and materials were furnished to be used and were actually used in and about the erection and construction of said improvements * * *." It is then alleged that no part of said sums has been paid except the sum of $68,225.84 and that there is now due and owing from Radkovich the sum of $14,649.69. [123]

The second cause of action incorporates all of the allegations with reference to the prime contract, bond, etc., of the first cause, and states that Woolley furnished certain labor, materials, etc., on the work of improvement mentioned, at the special instance and request of Radkovich Company and upon its promise to pay the reasonable value thereof, and that all of the said labor, materials, etc., "were furnished to be used and were actually used in the performance of said work of improvements and in connection with the performance of said prime contract." That the current market price and reasonable value of the labor, materials, etc., was the sum

of $93,052.11, and that the sum of $24,826.27 is unpaid.

The third cause of action incorporates all of the allegations with reference to the prime contract, bond, etc., of the first cause, and sets forth that under the subcontract it was provided that Radkovich Company would have the buildings and improvements ready so that Woolley could proceed with his work under the subcontract so as to complete the same by April 15, 1948, and that he was instructed to commence work under the subcontract on September 1, 1947; that from September 1, 1947, to October 6, 1947, Woolley was ready, able, etc., to commence work but was prevented from beginning work until October 6, 1947, to his damage in the sum of $1,149.22, due to the failure of the Radkovich Company to have the work ready for him to proceed; that because of a similar failure of Radkovich to have the buildings and improvements in condition so that Woolley could prosecute his work without delay, Woolley was prevented from completing his subcontract work until [124] October 6, 1948, to his damage in the sum of $9,027.36.

The cross-claim then prays judgment against the Radkovich Company in the sum of $24,826.27 plus interest thereon at the rate of 7% per annum from October 6, 1948, and judgment against the defendants Radkovich sureties in a like sum as is prayed against their principal.

The cross-claim as amended takes into account the amount paid Westinghouse at the request of Woolley since the trial, also certain amounts conceded by

Woolley and his surety to be due Radkovich Company; it is our recollection that after the trial and during the filing of briefs there was a further concession of counsel for Woolley that some of the damages for delay in completion included some of the charges for labor in installing the so-called "extras" or additional work mentioned in the cross-claim.

In its answer to Woolley's cross-claim and supplement thereto Radkovich Company repeats some of the allegations of the cross-claim filed against Woolley and his surety with reference to the amount of the subcontract and the amount paid, denies that any damages are due Woolley because of any failure of Radkovich Company to permit Woolley to proceed with his subcontract, and alleges that Woolley failed to complete his said subcontract, and alleges that the Radkovich Company was compelled to furnish labor and materials to the amount of $7,887.09 to complete Woolley's subcontract.

The answer of Radkovich Company's sureties contains similar denials of the material allegations of Woolley's [125] cross-claim, and in addition sets forth a special defense to the effect that the bond filed by said sureties was not by its terms liable for losses sustained because of breach of contract by Radkovich Company, if any, causing any damages as alleged in Woolley's cross-claim.

It was conceded at the trial that the amount now due Westinghouse is the sum of $26,952.01 (not including interest[1] claimed on a larger amount), and

[1] See p. 9 transcript, where counsel stipulated as to interest. Illinois Surety Co. vs. John Davis Co., 244 U.S. 376, 381.

after this was agreed upon counsel for Westinghouse retired from further participation in the trial. Further references herein to "the parties" include only the Radkovich Company, Woolley and their respective sureties.

The bulk of the evidence has been offered on the ancillary matters arising by virtue of the subcontract, and relating to an accounting between Radkovich and Woolley. Testimony was given by each of the following witnesses on most of such matters: Wm. Radkovich, president of defendant Wm. Radkovich Company, Inc.; Eugene H. Parks, who was, at all times material to this action, an employee of the Radkovich Company, and the person authorized to deal with subcontractors on behalf of the prime contractor; Ralph E. Fergason, resident engineer for the United States Engineers on the construction involved herein; and the defendant Edwin B. Woolley. The persons mentioned comprise all of the witnesses, with the exception of the expert witness appointed by the court.

Deduction for Heaters

There is a disagreement between Radkovich Company and Woolley over the amount of the subcontract after the deduction by a change order signed by Col. A. T. W. Moore as Contracting Officer for the Government and Wm. Radkovich for the prime contractor. This change order, dated August 18, 1947, modifies the prime contract in that the government [126] agrees to furnish the electric water heaters and decreases the total amount of the prime

contract in the sum of $6,100.00. It is the position of counsel for Radkovich Company and its sureties that the total of Woolley's subcontract should be decreased in the same amount, and the case of U. S. vs. Miller-Davis, 61 F. S. 89 is cited as authority.

It does not appear from the evidence whether, at the time the change order was made, Woolley was consulted with reference to the amount to be deducted by the government for the heaters,[2] but there is testmony that when the bid was originally made Woolley overlooked the heaters, and afterwards informed Radkovich that the heaters would cost Woolley $6,100.00; that Radkovich permitted Woolley to increase his bid in the amount of only $5,000.00; that before the heaters were deducted from the prime contract, Woolley found he was able to obtain the heaters for $5,500.00, and accordingly contends that only said sum should be deducted from the amount of his subcontract.

We find nothing in the opinion in the case cited, U. S. vs. Miller-Davis, 61 F. S. 89, to indicate that the amount deducted by the government from a prime contract becomes the amount, ipso facto, which the latter may deduct from the subcontract. The findings of the court, set forth in full in the opinion, recite at page 92:

"The defendant Miller-Davis Company is entitled to deduct from amounts otherwise due the plaintiff the savings to the plaintiffs by reason of

---

[2] See Allegheny County Housing Authority vs. Caristo Const. Corp., 90 F. Supp. 1007, 1010, sy 4-6.

electrical work and labor eliminated by change orders of the United States."

The prime contract provides that if changes made by the government cause an increase or decrease of the amount due under the contract, an "equitable" adjustment shall be [127] made and the contract shall be modified in writing accordingly.

It appears, therefore, that by reason of the deduction of the heaters from the material to be furnished by Woolley he saved the sum of $5,500.00, and that such amount, as to Woolley, is an equitable deduction from the original amount of $80,000.00.

Using as the total of Woolley's subcontract the sum of $74,490.00, and subtracting from this the sum of $48,914.27 paid Woolley by Radkovich prior to the beginning of this action, and the sum of $16,562.04 paid by Radkovich to Westinghouse on behalf of Woolley, we have the sum of $65,476.31 paid to Woolley by Radkovich under the subcontract, leaving the sum of $9,013.69.

Delays

As we have noted under our analysis of the pleadings filed by Woolley, there is a claim for $1,149.22 because of Radkovich Company's failure to allow Woolley to begin work under his contract. The evidence is clear that Woolley received notice to proceed prior to August 28, 1947, and that the contractor had not "poured" any houses in which Woolley could place electrical wiring until October 4, 1947. Woolley kept a crew of men on the job during this time at a total pay roll of $1,149.22,

ut was able only to do some prefabbing at a pay roll
ost of $200, leaving a pay roll for inactive men dur-
ng this period of $949.22. It is urged that Woolley
ould not have begun in any event until after ap-
roval of his shop drawings, but it is our view that
ny delay in approval of Woolley's shop drawings
not attributable [128] to him, but to the changes
the drawings made by the office of the U. S.
ngineers.

In addition Woolley alleges he is entitled to the
um of $9,027.36 for the reason that he would have
ompleted his work under the subcontract by the
ompletion date set thereby, April 15, 1948, had not
adkovich caused said work to be delayed of com-
letion until October 6, 1948. The amount claimed
alleged by Woolley to represent his pay roll dur-
ng the period above indicated.

The evidence leaves open the question of just
hat Woolley's pay roll would have been had Rad-
ovich proceeded in such a manner that Woolley
ight have completed the work under the subcon-
act by April 15, 1948; there is independent testi-
ony to the effect that Woolley would have needed
ore men on the job, and thus his pay roll prior to
pril 15, 1948, would have been greater. Aside from
is uncertainty, there is no clear showing regarding
he cause of Radkovich's failure to complete the
ob on April 15, 1948. Radkovich testified he was
ampered by the weather; Fergason indicated that
adkovich caused the delay by improper procedure;
he change order dated April 19, 1948, and signed
y Radkovich Company, his sureties and by Col. A.

T. W. Moore as contracting officer for the Government, states that it was determined under Article 9 of the prime contract that the delay in performance of Radkovich's contract (as of the date of the change order) was caused by delays in delivery of equipment without fault or negligence of said company. Also, there is independent evidence that Woolley was chargeable with delay after April 15, 1948. [129]

Extras

Woolley claims that at the special instance and request of Radkovich Company he furnished labor and materials for said construction of the reasonable value of $8,385.53, and that said labor and materials were not included in the subcontract entered into between Woolley and Radkovich, but came under the heading of "extras," as follows: cost of hanging fixtures, $4,800.00; cost of installing phone circuits, $133.33; cost of installing chime circuits, $2,111.80; cost of installing closet lights, $1,232.54; cost of replacing two units, $107.86.

Radkovich Company admits that the phone circuits were not included in Woolley's contract, and there is evidence that the same were treated as the subject of a "change order" by the prime contractor and the Government,[3] and Radkovich Company has agreed it is obligated to pay Woolley for this work

[3] It appeared that this small amount was the cost of a phone circuit which the Engineers on the job told Radkovich they wanted and which he concedes he owes Woolley. No contention was made by any party to the action, including the sureties, with reference to this item.

nd material in the sum of $133.33. The other items, Radkovich Company claims, were called for by the ubcontract.

In the subcontract Woolley agreed to perform the bligations of the Radkovich Company as set forth n the prime contract with reference to certain work nore particularly referred to in schedules attached o the subcontract; the schedules in turn refer to ection 15-01 through 15-26 of the specifications of ne prime contract, and it is further provided that ne interpretation and construction of the conditions, tc., of the subcontract shall be subject to the in- erpretation and construction of the prime contract.

Section 15 of the prime contract is headed "Elec- rical Work; Interior" and Section 15-01, headed "Scope" provides that the work covered by such ection of the specifications

> "consists of furnishing all labor, equipment, [130] supplies and materials (except equipment designated to be furnished by the Government) including pilot lamps and performing all operations * * * necessary for the installation of complete interior wiring systems, duct systems, and electric service connections in strict accordance with this section of the specifications and applicable drawings, and subject to the terms and conditions of the contract."

Section 15-02 is headed "Applicable Specifica- ions and Standards" and contains Federal Speci- cation numbers for various electrical materials and xtures, including heaters, motors, outlets and even riction tape.

No mention is made of electric lighting fixtures or chime specifications.

Section 15-03b provides that within 30 days after the award of the contract and before any materials, etc., are purchased the contractor shall submit to the contracting officer a list of materials to be incorporated in the work, which list shall include such descriptive data, catalog numbers, etc., as may be required by the contracting officer. It is further provided that "any materials, fixtures and equipment listed which are not in accordance with the specification requirements may be rejected." Subsection c recites that if the contractor fails to submit such list the contracting officer will select a complete line of materials, fixtures and equipment which will be furnished by the contractor.

Section 15-04 provides, under the heading of "Government furnished equipment" that the Government will furnish and the contractor will install 100 domestic-type [131] refrigerators and 100 domestic-type ranges, at the locations indicated on the drawings or as directed.

Section 15-19, headed "Fixtures" reads:

> "Where type numbers are indicated on the drawings, the Contractor shall furnish and install all lighting fixtures in accordance with the applicable details."

Section 15-20, headed "Signaling system (for quarters)" states:

> "The Contractor shall furnish and install a low-voltage signaling system consisting of push buttons and musical door chimes as hereinafter

described and where indicated on the drawings * * *."

hen follows a description of the type of chimes, of he push buttons, of the gage of wiring and of the oltage for the transformer required.

It appears that Woolley negotiated his subcontract with Wm. Radkovich personally, and that Radkovich gave Woolley copies of certain portions of he prime contract, to wit, an electrical drawing (Exhibit 5) and the specifications (part of Exhibit 3) prior to the time Woolley made his bid. Woolley estified that after studying these specifications and he electrical drawing he computed his bid, and did not allow therein for any of the so-called "extras" because according to such specifications and drawng these items were not to be furnished and installed by him.

About September 30, 1947, a month after Woolley had entered upon the performance of his subcontract, he was given another drawing, Exhibit 11, marked "Revised Electrical Plan," on which was noted the approval of the U. S. Engineers under date of September 26, 1947, and bearing a notation: [132] "Note: Electrical Fixtures in Accordance With List to Be Submitted for Approval."

Woolley testified that the Revised Electrical Drawing showed, in addition to the items on the first electrical drawing given him, Exhibit 5, a telephone circuit, a three-way switch for the entry hall lights, two push buttons, a chime circuit, and a pull-chain light in the living room closet; that neither Exhibit 5 nor Exhibit 11 show any type numbers for fixtures,

but show only fixture outlets. Mr. Fergason testified that the type numbers for lighting fixtures are not shown on the drawings, but in his opinion, from a consideration of the contract, specifications and plans, was that the contractor was required to furnish the fixtures, but the specifications did not tell him what kind of fixtures; he was also of the opinion that the contractor was required to furnish chimes. Mr. Fergason also noted some of the differences between the original drawing and the Revised Electrical Drawing as testified by Woolley, but was of the opinion that both drawings show a chime circuit.

There is testimony on the part of Mr. Parks indicative of his opinion that "additions" were shown on the Revised Electrical Drawing; Woolley testified that Radovich agreed at one time to pay for the lighting fixtures and for their installation; Radkovich contradicted this, although he admitted agreeing to pay for the telephone outlet, and was uncertain whether he agreed to pay for the chimes and closet lights.

The evidence shows that from the date of September 30, 1947, when Woolley received the Revised Electrical Drawing as approved, until the completion of his work, he protested that he was not obligated to furnish the items he contended were outside his contract, and finally, at Radkovich's [133] request he furnished a list of electrical fixtures which were approved by the U. S. Engineers, purchased by Radkovich, and upon demand of Rad-

kovich installed by Woolley as were the chimes, closet lights and other items in controversy.

After the completion of a three-day trial during which much of the testimony of the witnesses mentioned herein referred to the so-called "extras," a transcript was furnished the Court. Later, an expert was selected by the parties, appointed by the Court, and given the contract and its documents, and written interrogatories propounded by counsel with reference to the technical features of the contract, the specifications and drawings. The expert, an architect highly competent in his own field, was unable to be of any assistance to the Court in interpreting the contract, etc., for the reason that he was not familiar with the type of construction involved and felt that most of the questions could best be answered by an expert in the electrical field.

Our own observation of the original electrical drawing, Exhibit 5, and of the Revised Electrical Drawing, Exhibit 11, leads us to agree with Woolley's testimony as to the differences between the two drawings, and it is obvious even to one not trained in reading such drawings that neither of them show any type numbers for lighting fixtures.

We note also that the various other sections in the specifications on Plumbing, Glass, Carpentry and so on give specifications that are extremely detailed, with Federal Specification numbers for such small items as glue, putty, locks and wax for kitchen floors as well as the major items, and that the Electrical Section contains quite detailed speci-

fications and numbers as to most of the electrical [134] items, even friction tape, but makes no mention of lighting fixtures or chime specification numbers.

Counsel for the prime contractor and sureties pointed out that the omission in the specifications regarding the type of fixtures may have been made because the Government intended to have the contractor submit a list of fixtures from which it could choose, but we believe Woolley's testimony that according to trade custom the provision in the contract regarding the submission of a list refers to a list of manufacturer's catalog numbers which the contractor offers as equal to the fixtures described in the Federal Specifications indicated by specification number, and that this list could be furnished only where fixtures were called for and mentioned by type number or described by a Federal Specification number. There is no doubt but that there are thousands of types of lighting fixtures that could have been placed in the outlets shown on the drawings, and it is true that the type of fixtures used could make a difference of thousands of dollars in the cost of electrical work under the contract.

In our study of the contract and its documents we have in mind that the construction covered by the contract was admittedly an experiment on the part of the Government; we feel that those drafting the contract specifications and drawings, as well as those bidding upon the work had little by way of custom and experience to guide them. It is understandable, therefore, that ambiguities and omis-

sions should occur in the contract and its documents and hence in the subcontract. It is possible that those drafting the specifications and drawings for the Government intended to add specifications and type numbers for the lighting fixtures and overlooked doing so, and it is possible that they [135] intended to show chimes and closet lights in the original drawings; it is likewise possible that, there being no standards according to Mr. Fergason's testimony for lighting fixtures for these concrete-poured houses, that the Government intended to furnish and install the fixtures and chimes, and the addition of these items to the list of Government furnished material was overlooked.

It is our view that the contract and its documents, the specifications and electrical drawing, showed that the contractor was not to furnish and install lighting fixtures, closet lights and telephone circuits; that if said contract, etc., did not similarly disclose that the contractor was not to furnish and install chimes, then at least, as to this matter, there existed ambiguities which should be resolved in favor of the contractor, and as between Radkovich and Woolley, in favor of Woolley.[4]

---

[4] See First Citizens Bank & Trust Co. vs. U.S., Ct. Cl., 1948, 76 F. Supp. 250, where the Court of Claims, pursuant to direction of the Senate heard evidence with reference to a claim for extras which claim had not been presented to the Contracting Officer. The plans carried the legend "Ditch where designated". Contractor understood the legend to mean that ditches were to be constructed where the drawing showed a ditch as part of the work to be

See: U. S. vs. Standard Rice Co., Inc., 323 U. S. 106, 111. Union Paving Co. vs. U. S. (9 Cir.) 150 F. 2d, 390, 393.

Counsel for Radkovich and sureties argue that under Articles 2 and 15 of the prime contract Woolley is barred from seeking compensation for the work he claims was not included in the subcontract.[5]

Article 2 contains a provision that in case of difference between drawings and specifications the specifications shall govern, and that in case of a discrepancy the matter shall be immediately submitted to the contracting officer, "without whose decision

---

performed. Government contended legend meant ditches were to be installed where designated by the engineer. Court ruled interpretation should be in favor of the party who had no hand in the preparation of the contract, etc., and that the contractor's interpretation was correct.

While it is not important, in view of the fact that the ambiguity referred to arose in the prime contract in a portion incorporated in the subcontract, the subcontract appears to have been prepared by Radkovich. See Flotation Systems, Inc., vs. U.S., 9 Cir. Calif. 1943, 136 F. 2d 483, 484. Calif. Civil Code 1654.

[5] See U. S. vs. Moorman, 338 U.S. 457; U.S. vs. Joseph A. Holpuch Co., 328 U.S. 234 at p. 239.

While the contract involved in the instant case showed the printed Article 15 deleted and a typed Article 15 substituted, the provisions of which do not appear to be exactly like the Article 15 mentioned in most of the reported cases on this subject as "standard", the cases above cited are authority that no court is justified in disregarding the effect of provisions in contracts for the settlement of disputes.

said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense."

Article 15 provides that "all disputes concerning questions of fact which may arise under the contract, or [136] disputes which may arise under the specifications * * * shall be decided by the Contracting Officer, who shall reduce his decision to writing * * *" and that the decision of the Contracting Officer may be appealed to the Chief of Engineers, whose written decision shall be final and conclusive upon the parties in absence of a further appeal to the Secretary of War.

We are of the view that any discrepancy disclosed by the drawings could not be determined by a reference to the specifications. The specifications refer to the drawings, and there is nothing in the former to govern the latter.

It appears from the evidence that immediately after Woolley received the Revised Electrical Drawing heretofore mentioned he called upon Mr. Parks and stated that his subcontract did not provide that he furnish the controverted items and that he would not furnish them unless he was paid in addition to the amount of the subcontract; Parks then took Woolley to a Mr. McCumber whose responsibility, according to Parks, was to "take care of this type of matter in submitting drawings and channeling them through the U. S. Engineers to obtain approval." There, according to the testimony of Parks and Woolley, McCumber stated that Woolley was not recognized in his office, had no standing to make

a protest, and that the matter was to be settled between the contractor and the subcontractor. Later, according to Woolley's testimony, Radkovich told him that it had been ruled that the controverted items were in the contract, and that Woolley was "stuck with it."

We can find no evidence that Radkovich ever presented the dispute to the "Contracting Officer" as that person is described under Article 28 of the contract, Section (b), and we find no evidence of any decision in the matter by either [137] of the two persons who appear in the exhibits as "Contracting Officers" and no evidence that any of the other persons connected with the office of the U. S. Engineers who passed on the dispute was an authorized representative or duly appointed successor of a contracting officer.[6]

We do not decide that absent the special circumstances we have just related it would have been the duty of the subcontractor, rather than the prime contractor, to carry the dispute to the Contracting Officer, etc., as provided by Section 15 of the con-

---

[6] See Yuhasz vs. U.S., 7 Cir. 1940, 109 F. 2d 467, 468, sy. 2, cited in U.S. vs. Goltra, 312 U.S. 203, note at 209. In the Yuhasz case the action of the engineer and inspector was relied upon by the contractor; court held such action did not satisfy provisions of the contract referring to "Contracting Officed".

Also: U.S. vs. Willis, 4 Cir. 1947, 164 F. 2d 453, 455. Continental Casualty Co. vs. U.S., 5 Cir. 1940, 113 F. 2d 284, 286, sy 3-4.

ract.[7] We are of the view that were that burden nposed by the contract upon the subcontractor, the adkovich Company would, under the conditions resented, be estopped to urge Woolley's failure to omply with such section.

As for the contention of the prime contractor nd sureties with reference to Article 2, it is our iew that the prime contractor, itself, adjusted the natter, and did so at its own risk and expense.[8]

Replacement of Units

Two buildings collapsed, necessitating replacement by Woolley of units already installed. The eight of the evidence is that this collapse was due faulty construction of the roof, a portion of the

---

[7] See U.S. vs. Madsen Construction Co., 6 Cir. 943, 139 F. 2d 613, 615, at bottom, where it is indicated subcontractor has duty of appeal, or to request that prime contractor appeal to Contracting Officer. Compare Allegheny County Housing Authority vs. Caristo Const. Corp., 90 F.S. 1007, 1010, holding, in effect, that relationship between prime and subcontractors so far as dealing with Government is analogous to trustee and ceste que trust"; that prime contractor has duty to keep subcontractor fully informed regarding such dealings, where subcontractor is affected.

[8] We wish expressly to note that our observations in this phase of the case are referable only to the equities between the subcontractor and the prime contractor, and we do not intend to suggest that the contractor may not have a meritorious claim against the Government with reference to the controverted items. See John A. Johnson & Sons vs. U.S., 4 Cir. 946, 153 F. 2d 534, 542.

work assumed by the prime contractor. Woolley is entitled to recover for this item as claimed, in the sum of $107.86.

Radkovich's Back Charges

Drury Electric Co. back charge: On or about June 7, 1948, after an interchange of letters between the subcontractor and the prime contractor with regard to the matters in dispute between them, Woolley left the job, claiming Radkovich had breached the subcontract. Radkovich lists as a back charge against Woolley a sum paid to Drury Electric [138] Company, another electrical contractor, while Woolley was off the job. The evidence is not clear that such contractor performed any of Woolley's work. On June 10, 1948, the Radkovich Company wrote Woolley that unless the latter resumed the performance of his subcontract by June 14, 1948, the prime contractor would take over performance thereof. Woolley returned to the job prior to or on June 14. It is our view that this back charge should be disallowed.

Back charges for lighting fixtures, chimes, etc.: Radkovich claims a back charge for certain materials purchased by him and installed by Woolley; such of these as are referable to items we have ruled Woolley was not obligated to furnish should be disallowed. This includes lighting fixture items listed as replacements of items stolen from the job totalling $18.53, and an item for freight in the sum of $107.00, and two items totaling $68.16 listed as replacements for lighting fixtures broken by Woolley's men. There

is no evidence that Woolley or his men were chargeable with any theft or breakage.

Conceded back charges are items in the sum of $2,213.53 for materials, etc., and $536 for pay roll.

Liability of Glens Falls Indemnity Company

The Glens Falls Indemnity Company, as we have heretofore mentioned, executed two bonds with E. B. Woolley, the subcontractor, as principal. One, a performance bond contained certain conditions, among them that the obligee, Radkovich Company, should perform its obligations under the subcontract and should notify the surety of any act on the part of the principal which might involve a loss for which the said surety would be responsible.

There are certain sums claimed by Radkovich to be due him from Woolley which might be considered as [139] attributable to failure of performance by Woolley, to wit, the furnishing by Radkovich of certain electrical materials (not included in the controverted items) and the hiring and payment by Radkovich of certain electrical workers. These items of Woolley's indebtedness were conceded by Woolley. They were also conceded by the surety, and for that reason we need not inquire into the question of whether Radkovich adhered to the conditions of the performance bond furnished by Woolley.

The payment bond indemnifies the obligee against any failure of Woolley "to promptly pay to all persons supplying labor and materials used in the prosecution of the work provided for in said sub-

contract." No conditions are incorporated into the bond.

While the two bonds were executed at the same time, the subcontract provides for separate bonds, and we are of the opinion that any failure of the principal contractor to observe the conditions of the performance bond may not be urged as a bar to recovery on the payment bond.[11]

The second affirmative defense of this surety sets forth that the subcontract was, without the consent of the surety, materially altered by Radkovich Company and Woolley in that, among other things, payments were made by said Radkovich Company to Woolley prior to the time that said payments became due under the terms of the contract.

The third affirmative defense is that the subcontract was altered to permit the prime contractor to take over control of said contract and that the Radkovich Company took control of and supervised and directed the purchase of materials and the subcontract work.

The fourth affirmative defense is that the prime contractor prematurely paid the subcontractor, between [140] September 1, 1947, and December 31, 1948, large sums of money in excess of the monies due the subcontractor on account of the subcontract work.

The fifth affirmative defense states that the sub-

---

[11] See Maryland Casualty Co. vs. Shafer, 57 Cal. App. 580, 1922; 208 P. 192. Summerbell vs. Weller, 110 Cal. App. 406, 294 P. 414. Lamson Co., Inc., vs. Jones, et al, ... Cal. App. ...., 24 P. 2d 845.

ontract was altered so that the said "subcontract vas not performed or constructed according to the olans or the specifications referred to in said subontract * * *."

The Sixth affirmative defense is that the cross-laim fails to state a claim, etc.

The seventh affirmative defense is that the prime ontractor ordered the subcontractor to perform ork not called for by the subcontract, etc., amounting to large sums of money for which the Radkovich Company refused to pay.

The second affirmative defense and the fourth appear to refer to the same point urged by the surety, namely, that the subcontract was materially altered in that a premature payment was made to the subcontractor; another point urged, though not specifically pleaded unless it is included in the phrase "among other things" in the second affirmative defense, is that the subcontract was altered to change the method and amount of payments due Woolley.[9]

Counsel for the surety have not contended that more than one payment was premature or in excess of the amount due Woolley at the time; they contend that after the so-called premature payment

---

[9] We feel, however, that the issue of a change in the method of payment to a lesser amount than was due the subcontractor is sufficiently pleaded in the general allegation, and whether it was or was not pleaded is of no importance in view of Rule 15 (b) F.R.C.P. and the fact that all parties recognized this as an issue. See U.S. vs. Cunningham, D.C. 1941, 25 F. 2d 28, 30.

Woolley received less on each payment than was due him at the time.

As to these defenses, the burden is, of course, upon the surety first to show the method of payment provided by the subcontract, and that such method was altered.

The subcontract, Section 3, provides in part:

"* * * The aforementioned consideration shall be paid to the subcontractor upon invoices [141] and vouchers surrendered therefor, in such manner and form as shall be prescribed by the contractor, subject to the reimbursement of the contractor therefor from the United States of America. Without, in any manner or fashion affecting the generalities of the reference to the principal contract and the agreements of the subcontractor hereunder to be bound thereby, payments shall be made by the contractor to the subcontractor only in accordance with the reimbursement of the contractor under and pursuant to the terms, provisions and conditions of Article 16 of the principal contract; and the subcontractor promises and agrees to cooperate with the contractor and to make, execute and deliver such instruments, vouchers and documents, inclusive of releases, as may be required by the contractor for compliance with the provisions of said Article 16."

Article 16 of the prime contract provides in part:

"Payments to contractor. (a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month or as soon thereafter as practicable, on estimates made and approved by the contracting

ficer. In preparing estimates the material delivered
the site and preparatory work done may be taken
to consideration.

(b) In making such partial payment there shall
retained 10% on the estimated amount [142] until
al completion and acceptance of all work * * *."
Counsel at the trial and in their briefs refer to
yments to be made under the prime contract as
progress payments," and counsel for Glens Falls
demnity Company in their reply brief filed July
, 1950, at page 7, lines 10 to 12 thereof, state that
estimates were calculated on the basis of the
rcentage of work completed at a given time. As
understand this statement, it means that if the
ntractor on a payment date has completed 3% of
s work under his contract he should receive an
nount which would bring his total compensation as
that date to 3% of the total amount of his con-
act, except for the 10% provided by the contract
be retained. Counsel for Radkovich and sureties
pears to share this view, as shown in paragraph
, page 7 of his reply brief filed August 11, 1950.
uch interpretation does not explain how the phrase
Article 16 "the material delivered on the site and
reparatory work done may be taken into considera-
on" is construed in arriving at the percentage to
paid the contractor.

However, if we give the subcontract the interpre-
tion contended for by counsel for Glens Falls In-
emnity Company, that Woolley was to be paid each
onth a percentage of the total amount of his sub-
ntract based upon the same percentage of his com-

pletion of the total amount of work to be done under his subcontract, we are still unable to determine from the evidence just what amount, on any given payment date, Woolley should have received under the proper payment procedure, and thus are unable to determine that the amount he did receive on each payment date was not the correct amount.

The first estimate, dated September 25, 1947, shows [143] materials listed as having been received on the job site in the total sum of $9,404.37, with sales tax and freight bringing the total to $9,885.37; no labor cost is listed. On this estimate, Woolley was paid $5,000.00.

The next estimate, November 1, 1947, for the month of October, shows the identical materials listed on the previous estimate plus some other materials, and the notation: "materials to date, $13,-111.71" and "labor costs to date, $3,439.38." The total estimate is in the sum of $16,551.09. Woolley's pay roll (Exhibit 12) beginning August 28, 1947, to October 29, 1947, inclusive, adds up to $2,774.17. Woolley testified that from August 28, 1947, to October 1, 1947, his men did no work on the job except prefabbing at a pay roll cost of $200.00, leaving an inactive pay roll up to October 1 in the sum of $949.22. Subtracting this sum we have a total of $1,824.95 for actual labor cost going into the job up to November 1. On the October estimate Woolley testified he was paid $15,000.00, which is about the amount of the estimate less the retained 10%. However, included in this estimate was material costing about $9,404.37 for which material he had already

been allowed $5,000.00 for September plus about $9,404.37 less 10% for October, and actual labor cost of $1,735.95 for which he was allowed about $3,439.38 less 10%.

On the estimate under date of November 24, 1947, we find:

"The following is a statement regarding above job for the month of November, 1947. Rough installations for 23½ houses at $390.00 per house. Payment due $9,165.00."

This estimate does not show any material delivered to the job during that month, and Woolley's pay roll from [144] October 30 to December 4, 1947, totals $2,771.16. On this estimate Woolley testified he was allowed $3,000.00.

Regarding the change to the unit method of payment Woolley testified that the November 24th estimate was based upon labor costs of $390.00 per house for roughed in work, as the rough-in material was already on the job and Woolley had been paid for it, but that Radkovich wanted Woolley to accept $200.00 per house for labor, and finally Radkovich told Woolley that the Radkovich Company was in financial trouble and Woolley accepted $3,000.00 on that estimate.

The next estimate is dated January 12, 1948, and is for the month of December, 1947. On this estimate Woolley lists 57 rough installations at $200.00 each, at $11,400.00, from which he subtracts $7,000.00 for 35 units previously billed, or a total of $4,400.00 for rough installations. Also listed is material delivered on job site for December in the sum of

$1,642.97, or a total of material and labor of $6,042.97. Woolley testified he agreed to take only $3,914.27 on this estimate which he said was the amount he had to have for his pay roll, and which he accepted because Radkovich was in financial difficulty.

Woolley's pay roll for December, 1947, according to his Exhibit 12 was the sum of $1,678.10. This, added to materials placed on the job, totals $3,321.07. Woolley listed 35 installations previously billed, yet the previous billing shows 23½ installations.

The next estimate is dated February 12, 1948, and is for the month of January, 1948, and shows a total of 77 rough-in installations with 57 units previously billed subtracted or a total of $4,000.00; also shown is $18,798.50 in material delivered on the job, with a total of $22,798.50. Woolley testified he had the last mentioned [145] sum due him but Radkovich disagreed, and gave him only $18,000.00. Woolley's pay roll for January was the sum of $2,837.55.

The next estimate is dated March 10, 1948, and shows 91 units roughed in and 77 previously billed subtracted, or a total of $2,800.00, with materials delivered on the site in the sum of $21,999.58. Woolley testified he received nothing on this estimate. Since the checks on the estimates appear to be dated a month or more later than the date of the estimate, we assume that the Westinghouse notice dated April 10, 1948, that Woolley owed the supplier the sum of $43,514.05 had reached the Radkovich Company and for that reason no payment was made on

such estimate. No further estimates were introduced into evidence.

We note, therefore, that prior to the March 10, 1947, estimate Woolley had furnished to the job according to the shipment list from Westinghouse, $30,633.64 in material, and according to his pay roll $9,111.76 worth of work, or a total of $39,745.40, and he had received from the Radkovich Company the sum of $48,914.27. (He had paid Westinghouse as of said date the sum of $9,108.00.)

Woolley testified that on certain of his estimates Mr. Fergason allowed him an amount greater than that paid him by the Radkovich Company as to such estimates, and counsel for the surety indicates that this is some proof that Woolley was not paid according to his contract. We are not concerned with Radkovich's failure to pay Woolley on the March 10, 1947, estimate, and as for the previous estimates, Mr. Fergason testified he did not pass on the first estimate; his only testimony which we have found in the transcript with reference to any subsequent estimate except that of March 10, 1947, is that with reference to the February [146] estimate he allowed the full amount of the material stated thereon, $18,000.00, less 10%. Further, the evidence shows that it was no part of Mr. Fergason's official duties to pass upon the amount due any subcontractor, and that anything he did along this line was done merely as an accommodation to the contractor. Mr. Parks stated he had nothing to do with the payment of Mr. Woolley; Mr. Radkovich stated he had never read Article 16 of the prime contract, that he had

no way of knowing how much was due Woolley each month other than a slip of paper given him each month by Mr. Fergason, which was written in pencil on scratch paper, and which Mr. Radkovich did not retain.

While we might be able to figure what percentage of the total amount of the subcontract each estimate represented, there is no evidence that the work covered by the estimate represented the same percentage of the work called for by the subcontract.

We advert to a colloquy between court and one of counsel for the surety at the trial: (tr. p. 60.)

The Court: And these estimates would show the variance between the payments provided for in the contract, is that your theory?

Mr. McCall: Well, they tend to, your Honor. It appears that we have no document before us or evidence showing how much the subcontractor was entitled to, and by these estimates we hope, through this plaintiff and the government engineer and the subcontractor, to show how much of this he was entitled to each month."

And to counsel's examination of Radkovich at page 71: [147]

"Q. Under your system, then, of payments there was no way in the world for Mr. Woolley to calculate how much he was entitled to each month, was there?"

Subsequent to the trial, at a hearing held in January of this year, after spending considerable time and study on the question of payment of the subcontractor, we asked counsel to enlighten us further

on this subject; briefs were filed, but counsel failed to spell out for the Court the matters requested and after our own laborious calculations, part of which we have set forth herein, we are of the opinion that there is "no way in the world" for counsel or the Court to ascertain from the evidence just what amount in any one payment date the subcontractor was entitled to receive; likewise, whether the subcontractor was, or was not, paid according to the terms of the subcontract.[10]

The evidence which the surety's counsel contend establishes a premature payment from the prime contractor to the surety relates to the payment, after the first of September 25, 1947, estimate was presented, of the sum of $4,000.00 to the subcontractor in addition to the $5,000.00 paid on such estimate. Radkovich testified that Woolley, when he presented said estimate in the sum of $9,885.37 stated that he must have $9,000.00 that day or he could not go on with the subcontract; also that Woolley had materials in that amount on the job site but some of them were locked up, and consequently the Government allowed Woolley only $5,000.00 on this estimate; that he, Radkovich loaned Woolley the sum of $4,000.00, and Woolley gave Radkovich the sum of

[10] It may be of some significance that throughout the correspondence in the Exhibits, and especially in the letter to Radkovich Co. of April 29, 1948, where Woolley's counsel reviewed the matters contended by Woolley to be breaches of the subcontract, no mention was made of any failure of the Radkovich Company to pay Woolley according to the subcontract.

$500.00 interest on the loan. While Radkovich used the word "advance" once or twice in referring to the matter, and once stated that he didn't loan the money to [148] Woolley, his testimony on the whole inclines us to the view that Radkovich considered the transaction as a loan. It was agreed between the two men that the prime contractor should repay itself from a subsequent payment due Woolley, and this was done; Woolley testified the transaction was arranged as a loan.

Counsel for Radkovich and sureties suggests that the $5,000.00 may have been a payment on the estimate, which showed over $9,000.00 worth of material on the job site; in reply counsel for the surety Glens Falls Indemnity Company suggests that if this is so, then when Radkovich deducted the $5,000.00 from the later estimate, he underpaid Woolley as to that estimate. Aside from the testimony of Woolley and Radkovich that the payment was a loan, we would still be unable to agree with counsel for the surety that a premature payment has been established; a finding of a payment on the subcontract in excess of the amount due must be predicated upon a finding as to what amount was due, and such a finding is impossible from the evidence.

Third affirmative defense: We find no evidence that the prime contractor took "control" of the subcontract; and any supervision it exercised over the subcontractor was sanctioned by the contract.

Fifth affirmative defense: Any alteration of the subcontract so that the same was not performed

according to the plans and specifications was the subject of a written change order with the exception of the addition of the $133.33 telephone circuit which seems to have been constructed pursuant to an oral order of the U. S. Engineers on the job, agreed upon by Radkovich and not complained of by the surety. We find no merit in this defense.

Sixth affirmative defense: The cross-claim states [149] a claim against said surety upon which relief can be granted.

Seventh affirmative defense: This defense is ambiguous on the face of the pleading, inasmuch as it is not alleged that Woolley furnished any extra and additional materials not called for by the subcontract. The mere fact that the prime contractor ordered the subcontractor to furnish such additional materials is no ground for release of the surety.

Liability of Radkovich and His Sureties

Liability of Radkovich

The payment bond of the Radkovich sureties, is, as required by the Miller Act (40 U.S.C.A., Section 270a (2)) a bond "for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract."

Woolley's cross-claim against Radkovich and sureties is brought under the Miller Act, and the liability of such sureties must be predicated upon the provisions of the bond given pursuant to such Act.

The bond recites that "the principal shall promptly make payment to all persons suplying labor and material in the prosecution of the work pro-

vided for in said contract, and any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the Sureties being hereby waived * * *."

As we have mentioned earlier herein, there is no contention by anyone that any of the labor or materials supplied by Woolley (except the small item of $133.33 for phone circuits with which none of the parties is concerned) were supplied pursuant to "any and all duly authorized modifications of said (prime) contract" and no one contends that any duly authorized modification of the prime contract [150] provided for any labor or materials to be supplied by Woolley over and above the amount of his subcontract, and no one contends there were any duly authorized modifications of said (prime) contract except the change orders attached to said prime contract, having to do with the deletion for the heaters and the extension of time of performance.

It is obvious therefore that if Woolley can recover under the Miller Act from the Radkovich sureties, it must appear that the amounts he seeks represent "labor and material" supplied "in the prosecution of the work provided for in said (prime) contract."

In his answer to the complaint filed by Westinghouse Woolley denies that all the materials furnished him by Westinghouse were used in the performance of his subcontract with the defendant Radkovich Company, stating that a portion of said materials were used by him for extra work or additions to the subcontract at the request of Radkovich Company, but he admits that all of the Westinghouse mate-

ials actually went into "said work and the structures erected."

In his cross-claim against Radkovich and sureties Woolley does not at any point make a clear and definite allegation that the labor and materials he sues for over and above the amount of his subcontract were "supplied in the prosecution of the work provided for in said (prime) contract, or any authorized modification thereof."

In his allegation with reference to the labor and materials furnished under his subcontract Woolley has mentioned that these were furnished to be used and were actually used in and about the construction of "said improvements."

In his allegation with reference to the labor and materials used in the so-called "extras" he states these [151] were "furnished to be used and were actually used in and about the erection and construction of said improvements" and were in addition to the labor and materials furnished under his subcontract.

In his allegation where he lumps together, as labor and materials furnished at the special instance and request of Radkovich Company and upon its promise to pay the reasonable value thereof, the amounts referable to the subcontract, the so-called "extras" or controverted items, and the sums referable to Radkovich's failure to allow him to proceed with his subcontract, Woolley states these were "furnished to be used and were actually used in the performance of said work of improvement and in con-

nection with the performance of said prime contract."

On the other hand, Radkovich Company in its answer to Woolley's cross-claim admits that Woolley furnished certain labor and materials provided for by his subcontract and further alleges that any labor and material for which Woolley seeks recovery as additional labor and materials were in fact "provided to be furnished by said cross-complainant as subcontractor under the terms and conditions of the subcontract and the specifications of the principal contract expressly made a part of the subcontract."

In their answer to the Westinghouse complaint the Radkovich sureties deny for lack of information the allegations regarding the Westinghouse materials being supplied for use and used in the prosecution of the work provided for in said (prime) contract, but at the trial counsel for said sureties conceded they had no defense to the claim of Westinghouse; this implies admission that all the Westinghouse materials were supplied in the prosecution of the work provided for in said (prime) contract, according to the terms [152] of the bond.

In their answer to Woolley's cross-claim the Radkovich sureties likewise for lack of information deny all Woolley's allegations regarding the supplying of materials and labor under and in addition to his subcontract and set up a special defense that their bond is not liable by its terms for any loss sustained because of a breach of contract by Radkovich Company causing delays and that if Woolley sustained

any damages thereby the same are without the terms of the bond.

Whatever we may glean from a consideration of the complicated pleadings in this case the facts remain that the same was tried on the theory that Woolley contends he supplied all the labor and materials called for in his subcontract and in addition he supplied labor and materials not called for in the subcontract or in the prime contract, and that all such labor and materials were used in the construction of the 100 Le Torneau houses at Muroc for the Government; also that by reason of Radkovich's not having ready the construction into which Woolley could place his work after he was ordered to begin performance on his subcontract he was delayed at the begininng thereof and obliged to pay for inactive labor kept on the job, and that by similar failures of Radkovich Company he was delayed in the prosecution of his subcontract to completion.

The case was likewise tried on the theory that Radkovich Company contends all the labor and materials supplied by Woolley were supplied in the prosecution of the work provided for in the prime contract and thus in the subcontract, and that any delay occasioned Woolley was without the fault of Radkovich.

The case was also tried on the theory that the Radkovich sureties contend they are not liable for any [153] damages for delay referable to a breach of the subcontract by the prime contractor.

We have previously concluded herein that Woolley has made proof of labor costs entailed and

damages suffered by reason of the failure of Radkovich to allow him to begin the prosecution of his subcontract, and that Woolley has not made proof of labor costs entailed or damages suffered by reason of any failure of Radkovich to allow him to proceed with the completion of his subcontract, nor has he made proof that any failure in this regard was any fault of Radkovich.

We have also concluded that Woolley has made proof that he supplied certain labor and materials which the prime contractor was not obligated under the prime contract to furnish and which the subcontractor was not obligated under the subcontract to furnish, and that these labor and materials were furnished on demand of Radkovich, and used in the 100 houses constructed by the Radkovich Company for the United States.

We must now endeavor to conclude whether, under the Miller Act, Woolley is entitled to recover herein; if not, whether he can obtain judgment against the prime contractor in this Court by virtue of the laws of the State of California, in the absence of diversity of citizenship, no diversity having been pleaded or shown.

(1) Did the placing of Woolley's men on the job pursuant to notice given him by the prime contractor to proceed, and the keeping of these men on the job in readiness to begin performance amount to "supplying labor and material in the prosecution of the work provided for in said (prime) contract"?

(2) Did the installation by Woolley of the con-

roverted items amount to "supplying labor and
aterial in the prosecution of the work provided for
i said (prime) contract"?

We have already set forth the facts which are
elevant to the first conclusion; we feel that a more
etailed review of the evidence as to relations be-
veen Radkovich and Woolley prior to the installa-
on by the latter of the controverted items will be
elpful.

In September, 1947, and in March, April, May
nd June of 1948 there was correspondence between
ie Radkovich Company and Woolley, or Woolley's
ounsel which alluded to the furnishing and install-
ig of the closet lights, lighting fixtures and chimes;
letter from Radkovich to Woolley dated May 18,
948, enclosed a letter from the Chief of the Opera-
ons Division of the United States Engineer's Office
herein Radkovich was told that unless the pro-
osed schedule of electrical fixtures was received by
une 1, the Contracting Officer would select fix-
ires to be furnished by the contractor without
iange in the contract price.

Sometime between June 1, 1948, and June 7, 1948,
meeting was had at which Radkovich of the Rad-
ovich Company, Woolley and their respective coun-
el were present. Mr. Decker, who appears here as
ie of the counsel for Woolley's surety, attended
ie meeting as did a representative of said surety.
he evidence is not very clear as to what transpired
the meeting, but according to Woolley and Rad-
ovich, the dispute between them was discussed;
adkovich stated Woolley was expected to supply

the lighting fixtures, etc., and Woolley refused to furnish or install the same.

On June 4, 1948, counsel for Woolley wrote the Radkovich Company that its repeated refusal to carry out its obligations under the subcontract made it impossible for Woolley to carry on further; that Woolley must stand on his [155] legal rights and was removing his men and equipment from the job on June 7, 1948.

On or about June 7, 1948, Woolley and his men withdrew from the job; on June 10, 1948, Radkovich Company wrote Woolley that he was in default with reference to the performance of his subcontract, and that unless he should resume performance under the subcontract on or before June 14, 1948, the prime contractor would take over the completion of the work under the subcontract and reserve all rights and remedies against Woolley and his sureties for damages.

On June 10 or 11, 1948, Radkovich Company caused another electrical contractor, the Drury Electric Company, to place its men at the job-site; on June 12 a letter was sent by Woolley to Radkovich Company stating, in part:

> "* * * I shall remuse work under subcontract * * * on or before * * * June 14, 1948."

The letter further provided that the resumption of work should be without prejudice to any rights or remedies which Woolley might have against Radkovich, particularly those matters referred to in the letters of April 29 and May 8 from Woolley's coun-

sel, and should not be construed as a waiver of any of Woolley's rights or remedies.

Woolley then resumed work on or before June 14, 1948.

After Woolley returned to the job, there was still more correspondence between the said two parties, the last letter referring to the controverted items being dated July 19, 1948. In all their written communications neither Radkovich nor Woolley departed from their respective positions—Woolley insisting that he was not obligated to furnish and install the items, but would do so as "extras" and would look to Radkovich for compensation over the amount of his subcontract; Radkovich Company insisting that Woolley was obligated in this [156] regard and would receive no extra compensaton for the furnishing and installing of said items.

We are satisfied that if Woolley ever understood that Radkovich had agreed to compensate him in addition to the sum of his subcontract, such understanding was of short duration, and was dispelled by correspondence before the fixtures, etc., were installed by Woolley.

In short, the situation summed up was this; neither the prime contract nor the subcontract provided for these controverted items; no dispute concerning them was presented to or settled by the Contracting Officer; no change order as provided for in the contract was issued for their inclusion in the contract; the prime contractor ordered the subcontractor to furnish them or be subject to penalties for non-performance of his contract; the sub-

contractor furnished them contending they were not covered by the prime contract nor by any change order under the contract, nor by the subcontract, and informing the prime contractor he would look to it for compensation for these items.

Counsel for Radkovich Company and sureties have cited L. P. Friestedt Co. et al v. U. S. Fireproofing Co. et al, 10 Cir. 1942, 125 F.2d 1010. There the prime contractor delayed in completing his preliminary work and as a result the subcontractor was compelled to hoist all steel by hand and to rent additional equipment. The Court observed that, stripped of all technicality, the subcontractor sought to recover damages for breach of an implied covenant of the prime contractor against unreasonable delay preventing the subcontractor from proceeding with their work. Said the Court: (p. 1011)

"The bond . . . requires payment not only of work and materials specifically mentioned in [157] the contract, but also those items which the parties necessarily and reasonably contemplated as being required for the performance of the contract."

After citing Brogan v. National Surety Co., 246 U. S. 257, where recovery on the bond was allowed a person who furnished groceries in a remote area where the contractor boarded his men; Title Guaranty & Trust Company v. Crane Co., 219 U. S. 24, where recovery was allowed for cartage and towage of materials and for drawings and patterns used by the contractor; and U. S. F. & G. Co. v. U. S., 231 U. S. 237, where recovery was allowed for labor at a quarry operated fifty miles away from the site

f the construction, and Illinois Surety Co. v. John Davis Co., 244 U. S. 376, where recovery was allowed for the expense of loading and freighting quipment used by the contractor, the Court observed: (p. 1012)

"* * * In each of these cases the Act was liberally construed to protect those furnishing labor and aterial that went into the construction covered by ne contract. It is to be noted, however, that in very instance recovery was allowed on the bond because the outlays for which recovery was sought ere necessary for the performance of the contract nd were within the contemplation of the parties o the contract." (Emphasis supplied)

Continuing, we find: (p. 1012)

"* * * The claim for which the parties seek recovery here did not arise under the contract, but utside of the contract. What was done was not equired by any of the terms of the contract, but ecame necessary because of an alleged breach of 158] the contract because a contractor violated one f the terms of the contract, in other words, committed a wrong against the parties resulting in loss r damage to them.

"* * * We fail to discern anything in the Heard ct evidencing a Congressional intent to protect ne under the bond required by the Act against amages for breach of contract."

In Continental Casualty Co. v. Schaefer, 9 Cir. 949, 173 F.2d 5, the prime contractor was required nder the subcontract to perform certain excava-

tions and furnish certain materials in accordance with the specifications and in proper time for the performance of the subcontract by the subcontractor. The prime contractor failed to make the excavations in the proper manner, and the subcontractor was obliged to do such work in order to proceed with its subcontract; other breaches by the prime contractor of the same order hindered and delayed the subcontractor; it appeared that the prime contractor had induced the subcontractor, by agreeing orally to compensate him, to continue performance after the breaches and to do some of the work the prime contractor was obligated under the prime contract to do. The Court found that the prime contractor had waived the provision in the subcontract requiring an agreement for additional work to be in writing by acting on oral notices; and that the measure of the subcontractor's recovery against the surety and prime contractor was reasonable value of the work and materials furnished plus overhead and profit.

The surety there contended that the subcontractor's action was one for damages for breach of contract and that it should not be liable for such damages, citing U. S. v. Maryland Casualty Co., 5 Cir., 147 F.2d 423; L. P. Friestedt [159] Co. v. U. S. Fireproofing Co., 10 Cir., 125 F.2d 1010. The Court of Appeals was of the view that the case before it was distinguishable from the cited cases because in the latter there was no agreement by the general contractor or the United States to pay any additional amount for the extra work done. The Court

lso noted that in the Friestedt case it was men-
ioned that the subcontractor made no claim that
hey furnished any extras necessary for the com-
letion of the contract and therefore contemplated
y the parties and implied in the contract, while in
ie case before it the subcontractor, by the per-
ormance of the new agreement, furnished labor
nd materials agreed to be supplied by the prime
ontractor under the prime contract and "hence
ithin the terms of the Miller Act and the bond."

In United States v. John A. Johnson & Sons,
945, 65 F.S. 514, District Judge William C. Cole-
ian, D. C. Maryland, considered problems of plead-
ig, jurisdiction, damages for delay and liability
f the surety under the Miller Act. It appeared that
s to one part of the case the court mentioned there
as a natural inference that the Government had
iade an error in specifying an inferior grade of
rick for the exterior work, and upon recognizing
ie error after the masonry work was well ad-
anced, attempted to cover up its error by relying
pon its right to reject any and all materials under
ie contract, and required the contractor to furnish
dditional bricks; the contractor, who was also
iarged with the duty to see that the bricks met the
ecifications, did not test them, but required the
ibcontractor to furnish other bricks. The Court, at
age 524 of its opinion, analyzed the situation:

"What really happened was what doubtless often
ccurs in building transactions, i. e. the [160] con-
ractor did not trouble to determine whether the
ricks really met the specifications but left this to

the owner (the Government) since it was the latter that he had to satisfy;* * *''

The Court then found that the bricks did meet the specifications, that the project engineer had been negligent not only in his failure to determine at the outset the true quality of the bricks, but in his unwillingness to recognize that the specifications were in error and that a change in the quality of the brick was called for; that the question of the Government's liability to the prime contractor was not before it, and whatever the Government's defense might be, the subcontractor was entitled to recover from the prime contractor and its sureties.

As to another set of facts considered in the same opinion, the subcontractor interposed a counterclaim that it had been damaged by reason of the prime contractor's failure to provide temporary construction necessary to the completion by the subcontractor on time of his contract, and that the prime contractor had failed to provide access to the site, all of which delayed the subcontractor. The general contractor and the surety filed a motion to dismiss as to such counterclaim on the ground that it was one for damages against the prime contractor for breach of contract, and could be cognizable in Federal Court only where diversity of citizenship appeared. The Court at page 527 discussed the possibility that the subcontractor might have a meritorious claim against the general contractor in a State court, but questioned the prosecution of the claim in the proceeding before it.

At page 528 the Court observed: [161]

". . . it is clear that the obligation by which the eneral contractor and surety are bound to sub- ontractors excludes payment for everything except ıbor and material actually called for by the con- ract between the general contractor and the Gov- rnment, which is made a part of the contract be- ween the general contractor and the subcontrac- or." (Emphasis supplied.)

At page 531 the Court adverted to the fact that ı another part of the proceeding it had allowed ıe subcontractor to recover upon a counterclaim gainst the general contractor for extra material nd labor furnished, (improper rejection of bricks) ut distinguished this by saying that though it was breach of contract by the general contractor,

". . . the performance by the subcontractor, upon hich he based his right to recovery, was perform- ıce such as was expressly required of him by the ontract for which, and only for which, he could re- over under the payment bond which we have here- fore analyzed; whereas in the present case, there the distinction that the subcontractor has not ıpplied labor and materials which he was, in fact, er required to supply by the terms of the con- act." (Emphasis supplied.)

The Court observed, at page 531, that while it ight be well that in an ordinary suit the Rules ould extend the scope of the action to permit the onsolidation of all the claims, it was unwilling to ıtertain the same in a Miller Act proceeding, and

at page 532 of the opinion ruled that the counterclaim should be dismissed. [162]

The opinion of the Court of Appeals of the Fourth Circuit on the appeal is reported at 153 F.2d 534. (Cer. den. 328 U. S. 865.) The dismissal of the subcontractor's counterclaim is not discussed, but the opinion of the lower court with reference to the other phases of the case is liberally quoted from and approved.

In Great Lakes Construction Co. v. Republic Creosoting Co., 8 Cir. 1943, 139 F.2d 456, the prime contractor failed in its obligation to have a site ready for the work of the flooring contractor; the subcontractor refused to proceed unless the prime contractor would compensate it for increased costs resulting from delay; the prime contractor took over and did part of the work under the subcontract; after a conference at which each party asserted the other had breached the subcontract, the subcontractor went ahead with the work each party reserving his rights; the lower court gave judgment against the prime contractor and surety on quantum meruit for the reasonable value of the work and material at the time it was finished, with interest from the date of filing of the action, holding that the conduct of the parties after the material breach by the prime contractor constituted an abandonment by the parties of the subcontract, and the subcontractor, having furnished material and labor which was accepted and received by the prime contractor and used and employed in the construction, was entitled to recover.

In Union Paving Company v. U. S., for the Use f Soule Steel Co., 9 Cir. 1945, 150 F.2d 390, the rection of falsework was admittedly necessary un- er the prime contract for the construction of piers nd abutments; the prime contractor sought to harge the subcontractor with the cost of such work nd the Court ruled that under the subcontract which was ambiguous and drawn by the prime ontractor) and [163] by virtue of the construction laced upon it by the parties, the prime contractor hould bear the cost of the work; it was contended, owever, that the subcontractor should have res- inded when it learned the prime contractor sought o charge it with the cost of the work. The Court uled that the subcontractor was not obliged to escind, but could, as it did, stand on the subcon- ract, and, being at all times ready and able to per- orm, keep it alive for the benefit of both par- es. (Citing McConnell v. Corona City Water Co., 49 Cal. 60, 85 P. 929, 8 L. R. A., N.S., 1171; Sobel- an v. Maier, 203 Cal. 1, 262 P. 1087; Dyer Bros. olden West Iron Works v. Central Iron Works, 2 Cal. App. 202, 237 P. 386, and other California ases.) Judgment for the subcontractor against the rime contractor and sureties was affirmed.

In Great Lakes Construction Co. v. Republic reosoting Co., 8 Cir. 1943, 139 F.2d 456, the Court, iting Guerini Stone Co. v. P. J. Carlin Construc- on Co., 248 U.S. 334, ruled that a contract to con- ruct the flooring in a building implied timely pro- ision of the situs for its location, and that the ailure of the prime contractor to have the building

ready for flooring work at such time as to have permitted the flooring subcontractor to perform the subcontract within its completion date justified the subcontractor's refusal to proceed; that when the prime contractor undertook to do the work itself, there was an abandonment of the subcontract and the acceptance of work and materials furnished by the subcontractor when it resumed work after a portion was done by the prime contractor entitled the subcontractor to recover against the bond on quantum meruit. In the case last cited the parties disagreed as to who had breached the contract, but the subcontractor finished the work, each party reserving its rights until an adjudication. [164]

We are of the view that nothing occurred at any time pertinent to this action which made it legally obligatory upon Woolley to pull off the job and remain until he received a written agreement for additional compensation; and we are of the view that the circumstances under which he left the job and returned resulted in no abandonment of the subcontract by either party, and in no change of their respective positions with reference to any controversy between them.

We have noted carefully the suggestion of Woolley's counsel that the "damages for delay" may be recovered under the heading of "labor and materials" supplied within the meaning of the Miller Act. It is true that the labor was delivered in good faith to the job-site[12] by the subcontractor; it was

[12] See: Purity Paint vs. Aetna Casualty & Surety Co., 56 F. S. 431; Glassell-Taylor Co. vs. Magnolia Petroleum Co., 5 Cir. 153 F. 2d 527.

not "used" in the houses to be constructed under the prime contract, but actual use has been held not to be conclusive; it was not incorporated into the substance of the houses to be constructed under the prime contract, but such incorporation[13] likewise has not been held conclusive; it was "necessary" in that the first portion of the electrical work had to be done between the inner and outer forms set up for the pouring of concrete by the prime contractor; it is also in evidence that the site was so located as to make it difficult to secure labor, and thus the retention of Woolley's men on the job in readiness to proceed as soon as the inner form of one of the houses was erected was required in order that the work under the prime contract could continue without delay.

These circumstances provide weight against the argument of the Radkovich sureties, but not sufficient to balance that of the reported decisions from which we have quoted at some length herein.

We therefore conclude that Woolley can not recover [165] under the Miller Act for the portion of his claim having to do with the failure of Radkovich Company to have the construction in such condition that Woolley could proceed when notified so to do.

Cases decided by the California courts provide ample authority that when Radkovich notified Wool-

---

[13] Title Guaranty & Trust Co. vs. Crane Co., 219 U.S. 24, 34; U. S. Fidelity Co. vs. Bartlett, 231 U.S. 237.

ley to proceed, the former was charged with the duty to have the construction ready for commencement of Woolley's subcontract; the failure so to do constituted a breach of the subcontract; Woolley had various remedies under State law, one of which was to continue the subcontract alive for the benefit of both parties and sue for damages for the breach.[15]

While Woolley has not separately stated nor specially pleaded a cause of action against Radkovich under the State law, his answer to the cross-claim of the Radkovich Company and its sureties, the last paragraph and the prayer thereof, is susceptible of such construction;[17] the state of the pleadings before us is not the same with reference to the various counterclaims as that discussed in the Johnson case (65 F.S. 514); the manner in which the issues were framed, we believe, justifies our taking jurisdiction in the absence of diversity of citizenship, and it is certain that the complexities of the case have occasioned too much labor of counsel and the Court for us to refuse, at this date, the consideration of ancillary matters or the complete adjudication of interrelated matters on over-technical

---

[15] Alder vs. Drudis, 30 Cal. 2d 195; Gray vs. Bekins, 186 Cal. 389, 199 P. 767, 769 sy 4; Remy vs. Olds, et al, 88 Cal. 537, 26 P. 355, 356, sy 3; Steel Tank & Pipe Co. of Calif. vs. Pac. Fire, etc., 69 Cal. App. 225, 230 P. 978, 980.

[17] After trial the judgment must grant relief to which plaintiff's case as presented entitles them." U. S. vs. Zara, 146 F. 2, 606, 609; F.R.C.P. 54 c.

grounds based upon niceties of pleading.[16]

We conclude that Woolley can recover herein against Radkovich Company for damages for breach of contract, consisting of Radkovich Company's failure to have its work ready for Woolley to begin the performance of his subcontract. [166]

With particular reference to Woolley's claim for installing the controverted items, counsel for the prime contractor and sureties cite United States v. Davidson, 71 F.S. 401, 408, and intimate that since the Government did not allow the items as "extras" to Radkovich and Radkovich has never received any extra compensation for the same, Woolley can not recover. The opinion in this case does nothing to uphold the theory on which it is cited; the parties stipulated the contractor and sureties were liable on many items similar to those in dispute here; as to some not shown on the plans, the District Court allowed the subcontractors judgment in full against the subcontractor and against the bonding company for the same amounts less profit and in some instances, less overhead; as to other items the Court found the prime contractor had appealed from an adverse decision of the contracting officer and as to these items disallowed them, subject to allowance if the appeal were sustained.

Counsel have also cited U. S. v. Henke, 8 Cir. 1946, 157 F.2d 13, affirming a decision reported at

---

[16] See: Lesnik vs. Public Industrials Corp. 2 Cir. 1944, 144 F. 2d 968; U. S. vs. Skilken, 53 F. S. 14, sy 6-8; U. S. vs. American Surety Co. 2 Cir. 142 F. 2d 726, sy 2.

67 F.S. 123, and this citation seems to be given especially toward the theory that as the subcontract provides for orders in writing for extras from the prime contractor based upon the prime contract provision for orders in writing from the Contracting Officer for same, Woolley could not recover in the absence of such written order for the controverted items. The small item of $144.88, which the lower court construed under Missouri law to represent an "extra" which required a written agreement for compensation, was actually for the cost of work occasioned by the failure of the prime contractor to prepare properly water tables on which the subcontractor was to place some of his work. The lower court also cited Missouri law to the effect that the subcontractor should [167] have refused to proceed on discovering the defective material until the prime contractor cured the defect or agreed to compensate the subcontractor. This case is of no assistance.

As between the Radkovich Company and Woolley, we think the situation might be described by paraphrasing some of the language used by the Court of Appeals, 4 Cir., speaking through Circuit Judge Soper in the opinion reported at 153 F.2nd 35, 45, sy 12, Ross Engineering Co. v. Pace:

"The situation is akin to that which occurs when one accepts goods or services from another who expects payment for them. It is urged upon us that no intention to pay for the (controverted items) can be attributed to (Radkovich) in this case in the face of its vigorous denial of all liability . . .

(and in the face of Woolley's failure to obtain a written order from Radkovich for compensation as an extra). But this attitude rests on the contention (that the controverted items were provided for in the prime contract) and since this view is no longer tenable in the light of (our conclusion), the defendant is forced into the field of quasi contracts where the rule is that, irrespective of the intent of the party to be charged, liability arises when one is enriched and receives a benefit at another's expense, for which it equitably ought to pay. It has been held in a variety of circumstances that when such a situation occurs, a contract to pay is implied in law." (Citing Williston on Contracts, Revised Edition, Vol. 1, Section 3, G. T. Fogle & Co. v. U. S., 4 Cir., 135 F.2d 117, 120, [168] Restatement, Contracts, Section 5.)

See, also, Lazzarevich v. Lazzarevich, 200 P.2d 49, (Cal. App.) discussion at page 57, sy 14-15.

We think that Woolley installed the controverted items under circumstances and conditions entirely outside the prime contract or the subcontract, and under circumstances and conditions giving rise to a duty on the part of Radkovich to compensate him for the amount claimed.

Regarding the liability of the sureties for the amount of these controverted items, we are frank to say that this problem has caused us some concern. Having found that Woolley installed these items under the contention, which we have concluded is correct, that they were not included in the prime contract or any portion thereof or modi-

fication thereof as labor or materials to be supplied by the prime contractor, can we now say that they were labor or materials supplied in the prosecution of the work provided for in said contract or any authorized modification thereof? Our concern, which is perhaps undue, arises because of the language found in some of the cases from which we have quoted, and the problem is not solved by reference to other cases cited in our notes herein where an attempt is made to give a general definition of what the bond protects.[18]

This difficulty has apparently not been shared by counsel for the surety who has not raised the question. Had they done so, we do not know, of course, what evidence might have been offered to combat it. In view of the weight of authority enjoining a liberal construction in favor of those for whose

---

[18] An opinion of a Special Master, adopted as the opinion of Judge Kerrigan of our Ninth Circuit is reported as U. S. For the Use of U. S. Rubber Co. et al, vs. Ambursen Dam Co., et al, 3 F. S. 548. It contains a full discussion and comparison of many important cases decided with reference to the coverage of the statute prior to 1933. It was stated by Judge Kerrigan:

"Instead of endeavoring to lay down broad rules of classification, the method adopted by the special master in considering the items (constituting 'labor and materials') was to attempt so far as possible, a 'matching' of cases, and where the cases are not in agreement to follow the more liberal rules, as indicated by the Supreme Court of the United States. It seems just to do this."

See Brogan vs. National Surety Co., 246 U.S. 257, 262.

benefit the Miller Act is passed, we shall not pursue the matter further.

Accordingly, we conclude that the Radkovich sureties are liable under the Miller Act for the amount claimed by Woolley for [169] installing the controverted items, less any amount included in his claim by reason of profit.

One half the costs should be borne by Woolley and his surety and the other half by Radkovich Company and its sureties.

Dated this 26th day of September, 1951.

/s/ JACOB WEINBERGER,
U. S. District Judge.

[Endorsed]: Filed Sept. 26, 1951. [170]

[Title of District Court and Cause.]

MINUTE ORDER

Judge Weinberger's Calendar, September 26, 1951.

It is Ordered: Counsel for Wm. Radkovich Company and its sureties will prepare and submit, in conformity with the rules of this Court, within 15 days from date hereof, proposed Findings, Conclusions and Judgment in accordance with the Memorandum of Conclusions this day filed herein.

Copies to counsel.

[Endorsed]: Filed Sept. 26, 1951. [177]

[Title of District Court and Cause.]

MEMORANDUM RE PROPOSED FINDINGS, CONCLUSIONS AND JUDGMENT AND OBJECTIONS THERETO.

Judge Weinberger's calendar, February 7, 1952.

Since the Court rendered its Memorandum of Conclsuions herein and ordered counsel for Wm. Radkovich Company and sureties to prepare and submit proposed findings, conclusions and judgment in conformity with said memorandum, counsel for the various parties hereto have submitted to the Court the several proposed forms of findings, conclusions and judgment, together with objections, comment and suggestions in the form of documents and letters all of which are attached to this memorandum.

On January 8, 1952 the matter of settlement of the findings, conclusions and judgment was ready for the Court's attention, and the Court was of the opinion that such settlement could proceed more advantageously at a hearing in open Court, but the heavy calendar of this Division of the Southern District has precluded a hearing.

Inasmuch as some of the proposed findings, etc., as well as the objections are not in such form as to be readily subject to a formal order granting or denying the [179] same, we make this informal memorandum so that counsel may be apprised of our views.

Referring to Objection I of objections submitted

y counsel for Woolley and counsel for his Surety, herein they urge that a finding be added to find- ng X to the effect that the faithful performance ond and the payment bond were written at the ame time, and for only one premium, we are in greement with Mr. McPharlin's comment in his etter of December 14, 1951. Further, since counsel or Glens Falls Indemnity Co. has not requested ny finding which will point to any violation of the erms of the performance bond as distinguished rom the terms of the payment bond, we fail to see he materiality of this additional finding.

Objection II: Counsel have requested an amend- nent to finding XIII which shall read that Wool- ey completed the subcontract on the 6th day of October, 1948. The evidence is not clear as to when Woolley completed the work of the subcontract as istinguished from the additional work, and we ave included a finding with reference to the com- letion of all the work by Woolley at the end of inding XVI. We have omitted from this finding Ir. McPharlin's reference to Woolley not sustain- ng damage "due to any other delay" than that of Radkovich, as we do not recall any delay other han that caused by Radkovich being in issue.

Objection III: The matters covered in this ob- ection are more fully explained in Mr. Benedict's etters of November 7, 1951 and January 8, 1952. We have re-examined the pay-roll records of Wool- ey in evidence and find that subsistence and trans- portation paid together with wages, etc., justifies finding that the cost per man-hour was $4.00. We

agree with Mr. McPharlin that said additional work was [180] not provided for in the contracts, and have used words which we feel will convey the meaning that while the additional work actually went into the buildings which were the subject of the contract, the additional work itself was not covered by the contract.

Objection IV: While it was alleged in Woolley's third cause of action that he received notice to commence work under the subcontract on September 1, 1947, etc. the Court's memorandum at page 6, line 20, states that Woolley received notice to proceed prior to August 28, 1947 and without re-checking the evidence, it is our recollection that he was ready, etc. on and after August 28, to proceed. With reference to the breach of contract, this seems to be more in the nature of a conclusion of law, and as the finding sets forth the facts which constitute the breach, we believe the language we have used in our adaptation of Mr. Benedict's proposed finding to be sufficient.

Objection V: While we feel that Glens Falls is entitled to a finding regarding the facts as to the payment it maintains was premature, such finding should be in accord with the Court's view of the evidence as expressed in our memorandum. The best evidence is the testimony of Fergason, himself, and our memorandum p. 24, line 29 states the latter testified he did not pass on Woolley's first estimate. Further, since no such duty was imposed on the Resident Engineer, we see no reason to men-

tion Fergason as such in connection with Woolley's estimate.

Regarding the proposed finding on the second estimate, we see no materiality in adding such a finding. We made mention of this estimate in reviewing all of Woolley's estimates to ascertain if we could find any basis for deciding what was due Woolley and whether he was or [181] was not paid such sum. Inclusion of this estimate, which was not put in issue, would justify a finding on all the other estimates mentioned in the Court's memorandum.

Concerning the conclusions of law and judgment, we have endeavored to include the matter of offsets so as to insure that Woolley's surety shall be entitled to receive any amount for which judgment is rendered for Woolley to apply to whatever amount the surety is required to pay Radkovich and sureties under the Glens Falls' bond. If counsel for either side feel that the question of offsets has not been properly set forth in the conclusions and judgment, they may propose amendments, giving the Court a full explanation therefor.

As to the amount of interest, the computation of interest allowed on the Westinghouse judgment was not furnished the Court as provided by rule 7 (h) of the local District Court Rules. Our computation, if not correct, may be changed by stipulation for an amendment by interlineation. [182]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial and the Court [183] having duly considered the evidence and being fully advised in the premises now finds the following:

I.

That the plaintiff Westinghouse Electric Supply Company was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to and engaged in doing business in the State of California.

II.

That the defendant Wm. Radkovich Company, Inc., was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of California and was duly licensed as a contractor in said State.

III.

That the defendant United Pacific Insurance Company was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington and authorized to and engaged in doing a general surety business in the State of California.

IV.

That the defendant General Casualty Company of America was at all times herein mentioned a cor-

poration duly organized and existing under and by virtue of the laws of the State of Washington and authorized to and engaged in doing a general surety business in the State of California.

V.

That the defendant Excess Insurance Company of America was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of State of New York and authorized to and engaged in doing a general surety business in the State of California.

VI.

That the defendant Manufacturers' Casualty Insurance Company was at all times herein mentioned a corporation duly organized [184] and existing under and by virtue of the laws of the State of Pennsylvania and authorized to and engaged in doing a general surety business in the State of California.

VII.

That at all times herein mentioned cross-defendant E. B. Woolley was a duly licensed electrical contractor in the State of California.

VIII.

That all times herein mentioned cross-defendant Glens Falls Indemnity Company was a corporation duly organized and existing under and by virute of the laws of the State of New York and authorized

to and engaged in doing a general surety business in the State of California.

IX.

On June 19, 1947, defendant Wm. Radkovich Company, Inc., (hereinafter referred to as Radkovich) as prime contractor entered into a contract with the United States of America for the construction of Temporary Family Quarters, Job No. Muroc A.A.F. 7-210-2 at Muroc Army Air Field, Muroc, California, said quarters to consist of 100 concrete houses of the "Letorneau" type as described in said contract (Radkovich's Exhibit B) and the plans and specifications made a part of said contract. Defendants United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America and Manufacturers' Casualty Insurance Company (hereinafter called Radkovich's Sureties) severally executed as Surety for Radkovich a Payment Bond pursuant to the provisions of the Miller Act (Sections 270A and 270B of Title 28, U.S.C.A.)

X.

On July 30, 1947, cross-defendant E. B. Woolley (hereinafter referred to as Woolley) as Electrical Subcontractor entered into a Subcontract (Radkovich's Exhibit C) with Radkovich for certain electrical work described in said prime contract. Cross-defendant Glens Falls Indemnity Company as Surety for Woolley executed a Faithful Perform-

ance Bond and a Payment Bond, each in the sum of $40,000.00 (Radkovich's Exhibit C). [185]

XI.

Plaintiff Westinghouse Electric Supply Company furnished to Woolley certain electrical materials of the value of $52,622.22 which materials were used by him in the construction of his work under said Subcontract. There was due, owing and unpaid from Woolley to Westinghouse the sum of $43,514.05 which became due and owing on the 10th day of April, 1948, and on October 27, 1949, at the request of Woolley and his surety, Radkovich paid to Westinghouse for the account of Woolley the sum of $16,562.04 which Radkovich admittedly owed Woolley under the latter's Subcontract, thus leaving a balance due Westinghouse for materials furnished to and used by Woolley in the construction of said work in the sum of $26,952.01 which has been due, owing and unpaid since October 27, 1949.

XII.

That all of the above mentioned materials and supplies furnished by Westinghouse to Woolley were actually used by Woolley in the performance of his Subcontract with Radkovich and in the work required to be done by the said prime contractor under his contract with the United States of America and by Woolley under his Subcontract with Radkovich. That Westinghouse had no direct contractural relationship with Radkovich, but did on April 10, 1948, serve upon Radkovich by registered

mail a notice in writing stating with substantial accuracy the amount claimed by Westinghouse and the name of the party to whom said materials were furnished. That said notice was served within ninety days of the date on which Westinghouse furnished the last of the materials for which claim was made. That the last delivery of materials for which claim is made was on March 31, 1948. That this action was commenced by Westinghouse more than ninety days after the date on which the last of said materials were furnished and prior to the expiration of one year after the date of final settlement of the prime contract.

XIII.

That the agreed price of the electrical subcontract work was the sum of $80,000.00 and that thereafter on August 18, 1947, the United States of America issued a change order deleting the requirement for electric water [186] heaters which were provided for in the prime contract and the electrical subcontract, and decreasing the total amount of the prime contract by the sum of $6,100.00 due to the deletion of said water heaters. That by reason of the deduction of said heaters from the material to be furnished by Woolley, he saved the sum of $5,500.00 and that such amount, as to Woolley, is an equitable deduction from the original amount of his subcontract which was in the sum of $80,000.00, leaving an adjusted subcontract price of $74.490.00 That the subcontract work was fully completed by Woolley.

XIV.

That of the adjusted subcontract price in the amount of $74,490.00 Radkovich paid to Woolley the sum of $48,914.27 and paid to Westinghouse for the account of and at the request of Woolley the sum of $16,562.04 making total payments in the sum of $65,476.31. In addition Radkovich is entitled to a further credit for materials furnished to Woolley of the reasonable value of $2,213.53 and for payrolls made at the request of Woolley in the sum of $536.00 making a total of $2,749.53 which items and amounts were conceded during the trial by Woolley and Glens Falls Indemnity Company, leaving an unpaid subcontract balance of $6,264.16.

XV.

That at the special instance and request of Radkovich, Woolley furnished additional labor and materials not required under the prime contract between Radkovich and the United States of America nor under the subcontract between Radkovich and Woolley. That the cost of said materials including overhead and reasonable profit thereon is as follows:

	Cost Including Overhead	Profit	Total
Installation of Fixtures			
Installation of Phone Circuits			
Installation of Chime Circuits			
Installation of Closet Lights	.....	.....	.....
Totals			

That none of the above listed labor and materials were required [187] to be furnished or installed under the provisions of the prime contract, the subcontract or the plans and specifications made a part thereof, nor any changes or modifications thereto.

That there is now due, owing and unpaid from Radkovich to Woolley the total cost of the above listed items, including profit, in the total sum of $....., and there is now due, owing and unpaid from Radkovich's Sureties to Woolley the cost only of the above listed labor and material, excluding profit, in the total sum of $.....

The roofs of two of the said concrete buildings collapsed due to faulty construction on the part of Radkovich which collapse damaged two electrical units in said buildings necessitating their replacement which was done by Woolley, and the reasonable value of the labor and materials for the replacement of these two units was the sum of $107.86 which sum is due, owing and unpaid from Radkovich and his Sureties to Woolley.

XVI.

That Woolley received from Radkovich a notice to proceed with the electrical work on September 1, 1947, and that on that date Woolley did send a crew of men to the job to proceed with the work, but that Radkovich did not erect any houses in which Woolley could place electrical wiring until October 4, 1947, and that between the dates of September 1, 1947, and October 4, 1947, Woolley's total payroll for his crew of men on the job was $1,149.22,

but he was able only to do prefabrication work at a payroll cost of $200.00, leaving a payroll for inactive men during this period of $949.22. That by reason of this delay Woolley was damaged in the amount of $949.22 for which sum Radkovich is indebted to Woolley but no part of said sum is due or owing from Radkovich's Sureties to Woolley. That other than aforesaid Woolley was not delayed in the completion of his work by Radkovich, nor did Woolley sustain any damage due to any other delay.

XVII.

That there was no material alteration or modification of the subcontract between Woolley and Radkovich; that Radkovich did not take control of said subcontract work; that there were no premature payments [188] made to Woolley by Radkovich; that there were no material changes or modifications of the plans or specifications referred to in said subcontract; that none of the facts alleged by the Glens Falls Indemnity Company as defenses is true.

CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

I.

Plaintiff Westinghouse is entitled to judgment against defendants Radkovich and his Sureties for the sum of $26,952.01, plus interest at the rate of 7% per annum on the sum of $43,514.05 for the period from April 10, 1948, to October 27, 1949, and plus interest at the rate of 7% per annum on the

sum of $26,952.01 for the period October 28, 1949, to the date of entry of judgment; that Radkovich and his Sureties are entitled to judgment over in like amount against Woolley and Glens Falls Indemnity Company; that Woolley is entitled to judgment against Radkovich in the sum of $..... and against Radkovich's Sureties in the sum of $.....; that one-half the court costs shall be borne by Woolley and his Surety and the other half by Radkovich and his Sureties.

Let judgment be entered accordingly.

.....

Jacob Weinberger,
United States District Judge

JUDGMENT

The above entitled action came on for trial before the Court [190] without a jury on May 17, 1951, the plaintiff appearing by its attorney, Glen Behymer; the defendants Wm. Radkovich Company, Inc., a corporation, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manufacturers' Casualty Insurance Company, a corporation, appearing by Eldon V. McPharlin of Anderson, McPharlin & Conners; defendant E. B. Woolley appearing by his attorney, Frank M. Benedict; and cross-defendant Glens Falls Indemnity Company, a corporation, appearing by John E. McCall and Harold J. Decker, and testimony having been offered and

briefs filed and the Court having filed its Findings of Fact, Conclusions of Law and Order for Judgment and its Memorandum of Conclusions herein, now pursuant to said Order for Judgment, it is hereby

Ordered and adjudged that the plaintiff United States of America, at the relation of and to the use of Westinghouse Electric Supply Company, a corporation, have judgment against defendants Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company in the sum of $26,952.01, plus interest at the rate of 7% per annum on the sum of $43,514.05 for the period from April 10, 1948, to October 27, 1949, and interest at the rate of 7% on the sum of $26,952.01 for the period October 28, 1949, to the date of this Judgment; that defendant Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company have judgment over in like amount against defendant E. B. Woolley and cross-defendant Glens Falls Indemnity Company; that defendant E. B. Woolley have judgment against Wm. Radkovich Company, Inc., in the sum of $..... and against United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance [191] Company in the sum of $.....; that one-half the court costs

shall be borne by defendant E. B. Woolley and cross-defendant Glens Falls Indemnity Company and one-half by Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company.

Dated: October ...., 1951.

.....

Jacob Weinberger,
United States District Judge.

[Endorsed]: Filed Feb. 7, 1952. [192]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND PROPOSED FINDINGS, CONCLUSIONS AND JUDGMENT

Cross-defendants, E. B. Woolley and Glens Falls Indemnity Company, a corporation, object to the findings proposed by Wm. Radkovich Company, Inc. and its sureties, and as grounds therefor urge the following:

I.

As to Finding X, said cross-defendants urge that there be added thereto the following:

"That said Faithful Performance Bond and said Payment Bond were executed by cross-defendant Glens Falls Indemnity Company at the same time, under the same bond number, for only one premium,

and both bonds relate to said subcontract." [193]

Comment: This addition is a finding of fact proved by said bonds in evidence (Radkovich's Exhibit C), is material to the issues and reflects the Court's announced views. (Memorandum of Decision, P. 18.)

II.

As to Finding XIII, said cross-defendants urge that there be added thereto, beginning on Page 5, Line 8, the following:

"Said subcontract was completed by Woolley on the 6th day of October, 1948."

Comment: The above addition in a finding based on uncontroverted evidence, is material to the issues and justifies the allowance of interest to Woolley from the date mentioned.

III.

As to Finding XV, said cross-defendants urge as follows:

(a) That the following portion be deleted: commencing at Page 5, Line 23, and continuing to Line 31 of said page:

"That the cost of said materials including overhead and reasonable profit thereon is as follows:

	Cost Including Overhead	Profit	Total
Installation of Fixtures	.....	.....	.....
Installation of Phone Circuits	.....	.....	.....
Installation of Chime Circuits	.....	.....	.....
Installation of Closet Lights	.....	.....	.....
Totals	.....	.....	....."

(b) That the following be inserted in lieu of the foregoing:

"That said additional labor and materials consisted of the following items, the cost and reasonable value of which are as follows: [194]

"Installation of Fixtures	$4,800.00
Installation of Phone Circuits	133.33
Installation of Chime Circuits	2,111.80
Installation of Closet Lights	1,232.54
Total	$8,277.67

"That said additional labor and materials were furnished to be used and were actually used in and about the erection and construction of said improvement."

(c) That the following portion be deleted: commencing at Page 6, Line 4 and continuing to Line 8 of said page:

"That there is now due, owing and unpaid from Radkovich to Woolley the total cost of the above-listed items, including profit, in the total sum of $....., and there is now due, owing and unpaid from Radkovich's Sureties to Woolley the cost only of the above-listed labor and material, excluding profit, in the total sum of $....."

(d) That the following be inserted in lieu of the foregoing:

"That no part of said sum of $8,277.67 has been paid and said sum of $8,277.67 is now due, owing and unpaid from said Radkovich and his sureties to Woolley."

Comment: The material which it is proposed be

deleted relates to overhead and profit of the extras mentioned which, as set forth in Frank M. Benedict's letter to the Court dated November 7, 1951, are not involved. The material to be added to said Finding is in accordance with the evidence and removes any question as to the extras not having been used in the work of improvement.

IV.

As to Finding XVI, said cross-defendants urge the following: that the first sentence thereof be deleted and the [195] following inserted in lieu thereof:

"That Woolley received from Radkovich a notice to proceed with the electrical work on August 28, 1947, and on that date Woolley was ready, willing and able to commence work under said subcontract and had a crew of men on the job for that purpose but Radkovich did not erect any houses in which Woolley could install electrical work until October 4, 1947, during all of which time Woolley was ready, willing and able to commence work under said subcontract and that Radkovich thereby breached said subcontract; that Woolley's total payroll for his crew of men on said job during said period was $1,149.22 but he was able only to do prefabricating work at a payroll cost of $200.00, leaving a payroll for inactive men during said period of $949.22."

Comment: The change proposed is for the purpose of making the finding more definite and certain and to comply with the Court's views. (Memo. of Dec., P. 44.) The correction of the date "September

1, 1947" to "August 28, 1947" is in accordance with the evidence. (Rep. Tr. p. 196, L. 19 to p. 197, L. 15.)

V.

As to Finding XVII, said cross-defendants urge that there be inserted on page 6, line 32, following the semicolon, the following:

"That Ralph E. Fergason was the Resident Engineer on said job from its commencement to completion; that Woolley presented estimates to Radkovich dated September 25, 1947, November 1, 1947, November 24, 1947, January 12, 1948, February 12, 1948, and March 10, 1948 (Glens Falls Exhibit 13); that said estimate dated September 25, 1947, was in the amount of [196] $9,885.37 for materials, sales tax and freight but with no labor cost listed, on which estimate said Resident Engineer allowed Woolley the sum of $5,000.00, which Radkovich paid to Woolley on October 22, 1947, together with the sum of $4,000.00, which latter amount Radkovich loaned to Woolley in return for the payment by Woolley to Radkovich of the sum of $500.00 as interest; that the payment by Radkovich to Woolley of said sum of $4,000.00 was not a premature payment to Woolley but was a loan by Radkovich to Woolley which was deducted by Radkovich from a second or third payment made to Woolley by Radkovich under said subcontract.

"That said second estimate, dated November 1, 1947, presented by Woolley to Radkovich, shows identical materials listed on the previous estimate of September 25, 1947, plus some other materials

and the notation: 'materials to date, $13,111.71' and 'labor costs to date, $3,439.38' and is in the total amount of $16,551.09, on which estimate Woolley was paid by Radkovich the sum of $15,000."

Comment: The above addition is material to the issues and reflects the Court's views (Memorandum of Decision, Pages 22, 26 and 27). That Ralph E. Fergason was the Resident Engineer on the job is undisputed (Rep. Tr. P. 88, L. 3—13). No attempt was made to controvert the estimates submitted by Woolley which speak for themselves. (Glens Falls Exhibit 13.) The portion of the foregoing addition relating to the alleged loan of $4,000.00 is based entirely on the testimony of Radkovich (See Radkovich's testimony: Rep. Tr. P. 70, L. 19-25; P. 73, L. 8-17; P. 74, L. 3 to P. 75, L. 1; P. 76, L. 7 to P. 78, L. 17) except in reference to the date of payment which is based on the uncontroverted [197] testimony of Woolley. (See Woolley's testimony: Rep. Tr. P. 234, L. 9 to P. 235, L. 5; also check for $500.00, Glen's Falls Exhibit No. 3.)

It is respectfully urged that the Court should consider the above objections and settle and determine the form of the findings to be entered herein.

Respectfully submitted,

JOHN E. McCALL and J. HAROLD DECKER,

/s/ By JOHN E. McCALL,
Attorneys for Glens Falls Indemnity Company.

/s/ FRANK M. BENEDICT,
Attorney for E. B. Woolley. [198]

First: That plaintiff Westinghouse is entitled to judgment against defendant Radkovich and his Sureties for the sum of $26,952.01, plus interest at the rate of 7% per annum on the sum of $43,514.05 for the period from April 10, 1948, to October 27, 1949, and plus interest at the rate of 7% per annum on the sum of $26,952.01 for the period October 28, 1949, to the date of entry of judgment.

Second: That Cross-Complainant E. B. Woolley is entitled to judgment against Wm. Radkovich Company, Inc. and its Sureties, United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company, in the sum of $15,249.69, together with interest thereon at the rate of 7% from the 6th of October, 1948, to the date of this judgment, making a total judgment against Wm. Radkovich Company, Inc. and his sureties of $.....

Third: That Cross-Complainant E. B. Woolley is entitled to judgment against said Wm. Radkovich Company, Inc. in the further sum of $949.22.

Fourth: That Wm. Radkovich Company, Inc., and its Sureties are entitled to judgment against Cross-Defendant E. B. Woolley and his Surety, Glens Falls Indemnity Company, in the sum of $....., being the total sum of principal and interest as shown in paragraph First and that from said amount there be deducted as an offset the sum of $....., being the total sum of principal and interest as shown in paragraph Second, to which the

said E. B. Woolley and his Surety, Glens Falls Indemnity Company, are entitled as a credit.

The Court further concludes that Wm. Radkovich Company, Inc., and its Sureties named in paragraph First, is entitled to judgment against E. B. Woolley and his Surety, Glens Falls Indemnity Company, in the sum of $....., being the balance of principal and interest after the offset mentioned above. [199]

It Is Hereby Ordered, Adjudged and Decreed by the Court as follows:

First: That Westinghouse Electric Supply Company, a corporation, have judgment against defendants Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company in the sum of $26,952.01, plus interest at the rate of 7% per annum on the sum of $43,514.05 for the period from April 10, 1948, to October 27, 1949, and interest at the rate of 7% on the sum of $26,952.01 for the period October 28, 1949, to the date of this judgment, making a total sum of $.....

Second: That Cross-Claimant E. B. Woolley have judgment against Wm. Radkovich Company, Inc. and its said sureties named in paragraph First for the sum of $15,249.69, together with interest thereon at the rate of 7% from the 6th day of October, 1948, to date of this judgment, making a total sum of $.....

Third: That Cross-Complainant E. B. Woolley have judgment against said Wm. Radkovich Company, Inc. in the further sum of $949.22.

Fourth: That Wm. Radkovich Company, Inc. and its sureties named in paragraph First have judgment against Cross-Defendants E. B. Woolley and his surety, Glens Falls Indemnity Company, in the sum of $....., as shown in paragraph First and that from this amount there be deducted as an offset the sum of $....., as shown in paragraph Second, to which Cross-Claimant and Cross-Defendant E. B. Woolley and his surety, Glens Falls Indemnity Company, are entitled as a credit.

It Is Therefore Ordered that Wm. Radkovich Company, Inc. and its sureties named in paragraph First have judgment against Cross-Defendants E. B. Woolley and his surety, Glens Falls Indemnity Company, in the sum of $..... [200]

[Title of District Court and Cause.]

SECOND PROPOSED FORM OF JUDGMENT

The above entitled action came on for trial before the Court, without a jury, on May 17, 1951, the plaintiff appearing by its attorney, Glen [201] Behymer; the defendants Wm. Radkovich Company, Inc., a corporation, United Pacific Insurance Company, a corporation, General Casualty Company of America, a corporation, Excess Insurance Company of America, a corporation, and Manu-

facturers' Casualty Insurance Company, a corporation, appearing by Eldon V. McPharlin of Anderson, McPharlin & Conners; defendant E. B. Woolley appearing by his attorney, Frank M. Benedict; and cross-defendant Glens Falls Indemnity Company, a corporation, appearing by John E. McCall and J. Harold Decker, and testimony having been offered and briefs filed and the Court having filed its Findings of Fact, Conclusions of Law and Order for Judgment and its Memorandum of Conclusions herein, now pursuant to said Order for Judgment,

It Is Hereby Ordered and Adjudged:

(1) That the plaintiff United States of America, at the relation of and to the use of Westinghouse Electric Supply Company, a corporation, have judgment against defendants Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company in the sum of $26,952.01, plus interest at the rate of 7% per annum on the sum of $43,514.05 for the period from April 10, 1948, to October 27, 1949, and interest at the rate of 7% on the sum of $26,952.01 for the period October 28, 1949, to the date of this Judgment;

(2) That defendant Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company have judgment over in like amount against defendant E. B. Woolley and

cross-defendant Glens Falls Indemnity Company;

(3) That defendant E. B. Woolley have judgment against Wm. Radkovich Company, Inc., in the sum of $....., which amount defendant E. B. Woolley and his Surety, Glens Falls Indemnity Company, [202] are entitled to offset against the judgment in favor of Wm. Radkovich Company, Inc.;

(4) That defendant E. B. Woolley have judgment against United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, Manufacturers' Casualty Insurance Company in the sum of $....., which amount E. B. Woolley and his Surety, Glens Falls Indemnity Company, are entitled to offset against the judgment in favor of said United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company;

(5) That one-half the court costs shall be borne by defendant E. B. Woolley and cross-defendant Glens Falls Indemnity Company and one-half by Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company.

Dated: November ...., 1951.

.....

JACOB WEINBERGER,
United States District Judge.

Conclusions of Law (Second Proposed Form)

From the foregoing facts the Court concludes:

I.

Plaintiff Westinghouse is entitled to judgment against defendants Radkovich and his Sureties for the sum of $26,952.01, plus interest at the rate of 7% per annum on the sum of $43,514.05 for the period from April 10, 1948, to October 27, 1949, and plus interest at the rate of 7% per annum on the sum of $26,952.01 for the period October 28, 1949, to the date of entry of judgment; that Radkovich and his Sureties are entitled to judgment over in like amount against Woolley and Glens Falls Indemnity Company; that Woolley is entitled to judgment against Radkovich in the sum of $....., which amount Woolley and his Surety, Glens Falls Indemnity Company, are entitled to offset against the judgment in favor of Radkovich; that Woolley is entitled to judgment against Radkovich's Sureties in the sum of $....., which amount Woolley and his Surety, Glens Falls Indemnity Company, are entitled to offset against the judgment in favor of Radkovich's Sureties; that one-half the court costs shall be borne by Woolley and his Surety and the other half by Radkovich and his Sureties.

Let judgment be entered accordingly.

.....

JACOB WEINBERGER,
United States District Judge.

[Letterhead of Anderson, McPharlin & Conners]

October 26, 1951

Honorable Jacob Weinberger
United States District Court
Custom House and Court House Bldg.
San Diego, California

Re: United States of America, etc. vs.
Wm. Radkovich Company, Inc., et al.
District Court No. 9303 Y

Dear Judge Weinberger:

Enclosed herewith in duplicate are the Findings of Fact, Conclusions of Law and Judgment. The Memorandum of Conclusions specifies that Woolley is entitled to an extra for the fixtures, chimes, closet lights and phone circuits, including profit, as against Radkovich Company, but only for the cost thereof excluding profit as against Radkovich's Sureties. These amounts have been left blank in the Findings and Judgment because of the discrepancy between Woolley's testimony and the amount of his claim. The only testimony in reference to this matter begins on page 205 of the Transcript wherein Woolley was questioned about his $4,800 labor charge and he testified that it was computed on the basis of 1200 man hours at $4 an hour, but that his actual cost was $2.40 an hour plus 2.7 and 1 per cent and 2.18 per cent per hundred. He then further testified that he thought he had charged 15 per cent for overhead and 10 per cent for profit upon the actual cost. In accordance with Woolley's testimony the actual wages, including the percentage items he

referred to and 15 per cent overhead and 10 per cent profit, would make a total of $3.14 per hour, and for 1200 hours the total sum of $3,768.00, and the total cost, excluding the 10 per cent profit, would be $3,480.00.

Yours very truly,

/s/ ELDON V. McPHARLIN.

EVM:pm Enc. cc. Frank M. Benedict, John E. McCall and J. Harold Decker. [205]

[Letterhead of Frank M. Benedict]

November 7, 1951

Honorable Jacob Weinberger
United States District Court
Custom House and Court House Bldg.
San Diego, California

Re: United States of America, etc., vs. Wm. Radkovich Company, Inc., et al. District Court No. 9303 Y.

Dear Judge Weinberger:

I am in receipt of a copy of the proposed Findings of Fact, Conclusions of Law and Judgment as prepared by Mr. McPharlin, together with a copy of his letter to you dated October 26, 1951. There are certain exceptions to the proposed findings and judgment which I desire be brought to your attention. As Mr. McCall and Mr. Decker likewise desire to file exceptions, I have asked them to incorporate my exceptions with theirs in order to simplify the matter.

In reference to the extras allowed Woolley in the Memorandum of Conclusions, I have discussed with Mr. Woolley his testimony regarding his labor costs for said items, referred to in Mr. McPharlin's letter. He advises me that he was mistaken when he stated that his labor costs of $4,800.00 for installing the fixtures included overhead and profit. It seems he had overlooked the fact that he had paid his men $7.00 per day each for subsistence, so that actually his labor costs work out at the rate of at least $4.00 per hour. Woolley's payroll summary, (Woolley's Exhibit 12) shows the payment of said subsistence pay during the whole of the time Woolley was engaged on the job. In other words, the payroll record shows that the average cost to Woolley per man hour was at least $4.00 per hour, exclusive of either overhead or profit.

In reference to the labor involved in all of the other extras, there appears to be no testimony in the record that said labor was other than actual cost at $4.00 per hour as supported by said payroll record.

It is respectfully submitted, therefore, that the following items left blank in the findings should be given as follows: [206]

Cost of Installation of Fixtures	$4,800.00
Cost of Installation of 'Phone Circuits	133.33
Cost of Installation of Chime Circuits	2,111.80
Cost of Installation of Closet Lights	1,232.54
Total	$8,277.67

While I feel that the payroll record in evidence

amply supports Woolley's position in this matter, if there is any doubt in the Court's mind regarding it, I respectfully request the reopening of the case to present further evidence on the point.

Yours very truly,

/s/ FRANK M. BENEDICT.

FMB/ws cc John E. McCall, J. Harold Decker, Eldon V. McPharlin. All in Rowan Bldg. [207]

[Letterhead of Anderson, McPharlin & Conners]

November 16, 1951

Honorable Jacob Weinberger
United States District Court
Custom House and Court House Bldg.
San Diego, California

Re: United States of America, etc., vs. Wm. Radkovich Co., Inc., et al. District Court No. 9303 Y.

Dear Judge Weinberger:

Enclosed herewith are a proposed amended Conclusions of Law and Judgment in which I have included provisions for offset of the judgments which the parties have against each other.

The proposed amended Judgment and Conclusions of Law which have been filed by the attorneys for the Glens Falls Indemnity Company are objectionable to the undersigned in that they provide for judgment for E. B. Woolley in an amount that is excessive and not in accordance with the Memo-

randum Conclusions of the Court and, also, for interest to Woolley which was not provided for in the Court's Memorandum. Furthermore, Woolley's proposed Conclusions and Judgment do not distinguish between the judgment he is entitled to as against Radkovich and as against Radkovich's Sureties.

A copy of the enclosed proposed Conclusions of Law and Judgment have been served upon the attorneys for E. B. Woolley and Glens Falls Indemnity Company.

Yours very truly,

/s/ ELDON V. McPHARLIN.

EVM:pm. Enc. cc. John E. McCall and J. Harold Decker, Frank M. Benedict. [209]

[Letterhead of Frank M. Benedict]

November 23, 1951

Honorable Jacob Weinberger
United States District Court
Custom House and Court House Bldg.
San Diego, California

Re: United States of America, etc. vs. Wm. Radkovich Company, Inc., et al. District Court No. 9303 Y.

Dear Judge Weinberger:

I enclose herewith Objections to the Proposed Findings of Fact submitted by Wm. Radkovich Company, Inc. and its Sureties which I hope you will find to be self-explanatory. In the preparation

of said Objections it was noticed that the amendment of the last part of the Judgment and the last part of the Conclusions of Law heretofore submitted by Mr. McCall and Mr. Decker included in the judgment against Radkovich and its Sureties the sum of $949.22, being the item for damages for delay sustained by Woolley, which is contrary to the Court's Memorandum of Decision. Accordingly, I have rewritten said amendments and enclose an original and a copy thereof herewith. A copy of said enclosures is likewise being mailed to the attorneys for Wm. Radkovich Company, Inc.

Yours very truly,

/s/ FRANK M. BENEDICT.

FMB/ws. Enclosures: CC to John E. McCall, J.
Harold Decker, Eldon V. McPharlin. [210]

San Diego, California, December 11, 1951

Mr. Eldon V. McPharland, Esq.
1017 Rowan Building
Los Angeles 13, California

Re: U.S.A. vs. Wm. Radkovich Co.
9303-W Civil

Dear Mr. McPharland:

At the request of Judge Weinberger, I am writing to ask if you would give him your comments on the objections to proposed findings of fact submitted by counsel for E. B. Woolley and for Glens Falls Indemnity Company. Also, your comments on the form of proposed amendments to findings and

conclusions submitted by Mr. Benedict.

Judge Weinberger would appreciate it if you can comply with this request within the next 2 or 3 days.

Sincerely,

BERNICE MORRIS
Law Clerk

BM:ct [211]

[Letterhead of Anderson, McPharlin & Conners]

December 14, 1951

Honorable Jacob Weinberger
United States District Court
Custom House and Court House Bldg.
San Diego, California

Re: United States of America, etc., vs. Wm. Radkovich Co., Inc., et al. District Court No. 9303-Y.

Dear Judge Weinberger:

I would like to make the following comments on the objections submitted by counsel for Woolley and Glens Falls Indemnity Company to the proposed findings of fact and, also, to the proposed amendments submitted, and, for convenience, I will follow the paragraph numbering of the objections.

Paragraph I of the objections: The date of the bonds is not in issue and is shown on the face of the bonds themselves. The wording, "for only one premium," is ambiguous since there were two bonds executed, each in the amount of $40,000.00, making

total of $80,000.00, which was the original amount
f the subcontract. The rate of premium on the
onds, as indicated on the face of the performance
ond, was $7.50 per thousand which, when based
pon the total amount of the two bonds in the sum
f $80,000.00, would mean a premium of $600.00,
hich was the amount that was charged by Glens
alls Indemnity Company as was shown on the face
f the performance bond. In addition, I do not feel
iat any method that the Glens Falls Indemnity
ompany might follow in allocating such premium
iat they collected would be material insofar as
ability under the bonds is concerned.

Paragraph II of objections: The request for an
mendment stating, "Said subcontract was com-
leted by Woolley on the 6th day of October,
948," is not an accurate statement of the facts
ince, when it is said that the subcontract was com-
leted, it would be inferred that the subcontract was
ully performed, which is not the case. The perform-
nce of the contract involves not only the doing of
he work, but the furnishing and paying for all
iaterials used by the subcontractor, and, in this
ase, Woolley still has not paid Westinghouse for
iaterials furnished to and used by him in the con-
truction. I feel that a more accurate statement or
nding of fact would be to say that the "work" was
ompleted on said date, but that the subcontractor
ad not fully complied with or performed under the
rovisions of the subcontract in that he had failed
o pay for materials supplied to and used by him
n his work. [212] For the same reasons, Woolley

would not be entitled to interest from such date since payment would not be due until he had fully performed under his subcontract which he still has not done.

Paragraph III of objections: The Court in its memorandum of conclusions awarded to Woolley as against Radkovich alone the cost plus overhead and profit of the items listed, but as against Radkovich's Sureties, the Court properly allowed only the cost and overhead and excluded the profit. Therefore, it is obviously necessary to show the breakdown by the cost including overhead and profit. Woolley's total claim for these items, including profit, are the amounts that are set out, and therefore, in arriving at the judgment against Radkovich's Sureties, the profit will have to be deducted from such items in accordance with the Court's determination as to the amount of cost and the amount of profit, which question has been brought to the Court's attention in previous communications from this writer and from counsel for Woolley. Also, under paragraph III (b) opposing counsel has requested an amendment stating that the additional labor and materials were furnished and used in "said improvement". I do not believe this is an accurate statement since the words, "said improvement," could obviously only refer to the improvement provided for in the general contract, the subcontract and the plans and specifications pertaining thereto, while, in this case, the court has found that the additional labor and materials furnished by Woolley were for work outside of said contracts, plans and specifications.

Paragraph III (c) and (d) of objections: The question of cost, overhead and profit has already been commented upon above. The objection and proposed amendment has drawn this writer's attention to an error that has been made in my own proposed findings in using the wording, "That there is now due, owing and unpaid from Radkovich to Woolley, etc." Since Woolley still has not fully performed his subcontract in that he has not paid Westinghouse, there is nothing now due, owing and unpaid from Radkovich to him, and there will not be until Woolley has paid the material bill of Westinghouse. It is suggested that better wording would be to state, "That the amount which will be due, owing and unpaid from Radkovich to Woolley, after payment by Woolley and his Surety of the amount due Westinghouse, is, etc."

Paragraph IV of objections: Insofar as the discrepancy of the dates September 1, 1947, and August 28, 1947, is concerned, it is the writer's recollection that there is in evidence the written notice to Woolley to commence work on September 1, 1947; however, this writer could be in error on that point since a copy of the exhibit is not available. Woolley's testimony was that the time commenced on August 28, 1947. In reference to the proposed amendment and the wording, "that Radkovich thereby breached said subcontract," the writer wishes to point out that Woolley's testimony was to the effect that prefabbing is the ordinary way of doing this type of job but that he did not have any approved plan for this prefabbing during that

period and was thus prevented from doing further productive work (Woolley's testimony, page 265), and this would relate to Woolley's duty in obtaining approved drawings for this detail work. [213]

Paragraph V of objections: This proposed amendment is in effect a request to insert numerous evidentiary matter rather than a finding of fact on a matter in issue. It is felt that if such evidentiary matter is to be included in the findings, then counsel for Radkovich and his Sureties would be compelled to also insist that their testimony and evidence which is contrary to, or which shows the immateriality of, that suggested in the amendment be also included in the findings.

Paragraph Second of Mr. Benedict's proposed amendments to conclusions of law: The amount of the judgment as set out in this paragraph is not correct and the exact amount will depend upon the Court's computation as to those items of additional work and materials which are involved. Furthermore, as previously commented upon, Woolley is not entitled to interest since he still has not performed the subcontract and did not pay his material supplier who instituted this suit against Radkovich and his Sureties.

Paragraph Fourth of the proposed amendment to the conclusions of law also includes reference to interest due Woolley which is objectionable for the same reasons.

The proposed judgment is objectionable on the same grounds as the conclusions of law. I feel that in order to more clearly set out the parties' respec-

tive rights of offset that there should be added to paragraph Second a clause to the effect, "and that Radkovich and his Sureties are entitled to offset against said judgment an equal amount of the judgment in their favor against Woolley and his Surety." In the writer's opinion the proposed conclusions and judgment do not clearly enough set out the rights of the parties to offset their respective judgments in an equal amount in order to make the net result a judgment over for Radkovich and his Sureties for the balance.

Copies of this letter are being forwarded to the attorneys for E. B. Woolley and Glens Falls Indemnity Company.

Yours very truly,

/s/ ELDON V. McPHARLIN

EVM:pm—cc. John E. McCall and J. Harold Decker, Frank M. Benedict. [214]

San Diego 1, California, December 28, 1951

Mr. Frank M. Benedict, Esq.
912 Rowan Bldg., 458 South Spring St.,
Los Angeles 13, California

Re: United States of America, etc., vs. Wm. Radkovich Company, Inc., et al.
No. 9303-Y-Civil

Dear Mr. Benedict:

Regarding your letter of November 7, 1951 wherein you mention that Mr. Woolley was in error

when he stated that the amounts prayed for as "extras" included profit, labor costs and overhead, and that such amounts actually included only labor costs, Judge Weinberger wishes me to point out that in your brief filed January 26, 1951 you segregated the labor, profit and overhead on each of these items. The profit and overhead shown adds up to $1,200.00.

An examination of the payroll does show that Woolley paid subsistence and in some instances, mileage, and that the cost of such items, together with actual wages, was in excess of $2.00, and was probably $4.00 per hour. However, Judge Weinberger does not recall any testimony about the number of hours it required to complete these "extras" other than it required about 1200 man hours to install the fixtures. If you can find in the transcript the testimony referring to the number of hours required on each of the other "extra" items, Judge Weinberger will be glad to consider the matter. In any event, he is disposed to allow the findings, etc., to recite that Woolley should have judgment against Radkovich and sureties for $4,800 as the cost of installing the fixtures, and against Radkovich for $4,800 plus overhead and profit. Please give us your computation on the latter amount.

Unless you can cite us where the number of man hours in [215] installing the other "extras" is shown in the transcript, Judge Weinberger wishes me to tell you he wishes the findings to show, as to these other "extras" the sums for labor, profit,

overhead as set forth in your brief filed on January 26, 1951.

May we hear from you by January 7th?

Sincerely,

BERNICE MORRIS
Law Clerk

BM:ct—cc—John E. McCall, Esq., J. Harold Decker, Esq., Eldon V. McPharlin, Esq. [216]

[Letterhead of Frank M. Benedict]

January 8, 1952

Honorable Jacob Weinberger, U. S. District Court,
Custom House and Court House Bldg.
San Diego, California

Re: United States of America, etc., vs. Wm. Radkovich Company, Inc., et al., District Court No. 9303-Y.

Dear Judge Weinberger:

Taking advantage of the four-day New Year's Holiday has delayed my making earlier reply to your letter of December 28, 1951, for which please accept my apologies.

In reference to the number of man hours expended by Woolley on extras, I have checked the Reporter's Transcript. Woolley testified to the effect that he expended 400 man hours at $4.00 an hour in the installation of the fixtures. (P. 205, L. 17 to 24; P. 243, L. 24 to P. 244, L. 3). In connection with the 'phone circuits Woolley testified that

he expended 33⅓ man hours at $4.00 an hour, a total of $133.33. (P. 244, L. 14 to 18). In reference to the closet lights Woolley testified that he expended 200 man hours at $4.00 an hour, a total of $800.00, and $432.54 for material. (P. 244, L. 22 to L. 25). As regards the extra for chime circuits it is true that Woolley did not testify as to the number of man hours but merely testified that this extra consisted of labor at $400.00 and material at $1,711.80. (P. 244, L. 7 to 13). However, according to my copy of Woolley's Exhibit No. 14, not only are the number of man hours set forth in reference to all of the foregoing extra items but the chime circuit installation is set forth at 100 man hours at $4.00 per hour, together with materials in the sum of $1,711.80.

It is true, as you pointed out, that in my brief filed January 26, 1951, I segregated the labor, profit and overhead on each of the items of extras, except the 'phone circuits, but I was acting under the belief at that time that all these items included overhead and profit as Mr. Woolley had stated.

It is respectfully submitted, therefore, that Finding XV [217] of the findings proposed by Radkovich and its sureties should be modified as indicated in Paragraph III of Objections to Proposed Findings of Fact on file herein.

Yours very truly,

/s/ FRANK M. BENEDICT

FMB/ws—cc: to John E. McCall, J. Harold Decker, Eldon V. McPharlin. [218]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

I.

That the plaintiff Westinghouse Electric Supply Company was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Delaware and authorized to and engaged in doing business in the State of California.

II.

That the defendant Wm. Radkovich Company, Inc., was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of California and was duly licensed as a contractor in said State.

III.

That the defendant United Pacific Insurance Company was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington and authorized to and engaged in doing a general surety business in the State of California.

IV.

That the defendant General Casualty Company of America was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Washington and authorized to and engaged in doing a general surety business in the State of California.

V.

That the defendant Excess Insurance Company of America was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the [220] State of New York and authorized to and engaged in doing a general surety business in the State of California.

VI.

That the defendant Manufacturers' Casualty Insurance Company was at all times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania and authorized to and engaged in doing a general surety business in the State of California.

VII.

That at all times herein mentioned cross-defendant E. B. Woolley was a duly licensed electrical contractor in the State of California.

VIII.

That at all times herein mentioned cross-defendant Glens Falls Indemnity Company was a corporation duly organized and existing under and by vir-

tue of the laws of the State of New York and authorized to and engaged in doing a general surety business in the State of California.

IX.

On June 19, 1947, defendant Wm. Radkovich Company, Inc., (hereinafter referred to as Radkovich) as prime contractor entered into a contract with the United States of America for the construction of Temporary Family Quarters, Job No. Muroc A.A.F. 7-210-2 at Muroc Army Air Field, Muroc, California, said quarters to consist of 100 concrete houses of the "Letorneau" type as described in said contract (Radkovich's Exhibit B) and the plans and specifications made a part of said contract. Defendants United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America and Manufacturers' Casualty Insurance Company (hereinafter called Radkovich's Sureties) [221] severally executed as Surety for Radkovich a Payment Bond pursuant to the provisions of the Miller Act (Sections 270A and 270B of Title 28, U.S.C.A.)

X.

On July 30, 1947, cross-defendant E. B. Woolley (hereinafter referred to as Woolley) as Electrical Subcontractor entered into a Subcontract (Radkovich's Exhibit C) with Radkovich for certain electrical work described in said prime contract. Cross-defendant Glens Falls Indemnity Company as Surety for Woolley executed a Faithful Perform-

ance Bond and a Payment Bond, each, in the sum of $40,000 (Radkovich's Exhibit C.)

XI.

Plaintiff Westinghouse Electric Supply Company furnished to Woolley certain electrical materials of the value of $52,622.22 which materials were used by him in the construction of his work under said Subcontract. There was due, owing and unpaid from Woolley to Westinghouse the sum of $43,-514.05 which became due and owing on the 10th day of April, 1948, and on October 27, 1949, at the request of Woolley and his surety, Radkovich paid to Westinghouse for the account of Woolley the sum of $16,562.04 which Radkovich admittedly owed Woolley under the latter's Subcontract, thus leaving a balance due Westinghouse for materials furnished to and used by Woolley in the construction of said work in the sum of $26,952.01 which has been due, owing and unpaid since October 27, 1949.

XII.

That all of the above mentioned materials and supplies furnished by Westinghouse to Woolley were actually used by Woolley in the performance of his Subcontract with Radkovich and in the work required to be done by the said [222] prime contractor under his contract with the United States of America and by Woolley under his Subcontract with Radkovich. That Westinghouse had no direct contractural relationship with Radkovich, but did on April 10, 1948, serve upon Radkovich by registered mail a notice in writing stating with sub-

stantial accuracy the amount claimed by Westinghouse and the name of the party to whom said materials were furnished. That said notice was served within ninety days of the date on which Westinghouse furnished the last of the materials for which claim was made. That the last delivery of materials for which claim is made was on March 31, 1948. That this action was commenced by Westinghouse more than ninety days after the date on which the last of said materials were furnished and prior to the expiration of one year after the date of final settlement of the prime contract.

XIII.

That the agreed price of the electrical subcontract work was the sum of $80,000.00 and that thereafter on August 18, 1947, the United States of America issued a change order deleting the requirement for electric water heaters which were provided for in the prime contract and the electrical subcontract, and decreasing the total amount of the prime contract by the sum of $6,100.00 due to the deletion of said water heaters. That by reason of the deduction of said heaters from the material to be furnished by Woolley, he saved the sum of $5,500.00 and that such amount, as to Woolley, is an equitable deduction from the original amount of his subcontract which was in the sum of $80,000.00, leaving an adjusted subcontract price of $74,490.00. That the subcontract work was fully completed by Woolley.

XIV.

That of the adjusted subcontract price in the

amount of $74,490.00 Radkovich paid to Woolley the sum of $48,914.27 and paid to Westinghouse for the account of and at the request of Woolley the sum of $16,562.04 making total payments in the sum of $65,476.31. In addition Radkovich is entitled to a further credit for materials furnished to Woolley of the reasonable value of $2,213.53 and for payrolls made at the request of Woolley in the sum of $536.00 making a total of $2,749.53 which items and amounts were conceded during the trial by Woolley and Glens Falls Indemnity Company, leaving an unpaid subcontract balance of 6,264.16.

XV.

That at the special instance and request of Radkovich Woolley furnished additional labor and materials not required under the prime contract, the sub-contract nor under any changes or modifications of said contracts, but which were furnished to be used and were actually used in additions to the structures and improvements covered by said contracts. That said labor and materials consisted of the following items, the cost and reasonable value of which are as follows:

Installation of Fixtures	$4,800.00
Installation of Phone Circuits	$ 133.33
Installation of Chime Circuits	$2,111.80
Installation of Closet Lights	$1,232.54
Total	$8,277.67

That no part of said sum of $8,277.67 has been paid and said sum of $8,277.67 is now due, owing and unpaid from said Radkovich and his sureties to Woolley.

The roofs of two of said concrete buildings collapsed due to faulty construction on the part of [224] Radkovich which collapse damaged two electrical units in said buildings necessitating their replacement which was done by Woolley, and the reasonable value of the labor and materials for the replacement of said units was the sum of $107.86 which sum is due, owing and unpaid from Radkovich and his Sureties to Woolley.

XVI.

That prior to August 28, 1947 Woolley received from Radkovich a notice to proceed with the electrical work and on August 28, 1947, Woolley was ready, willing and able to commence work under said subcontract and had a crew of men on the job for that purpose but Radkovich did not erect any structures in which Woolley could install electrical work until October 4, 1947, during all of which time Woolley was ready, willing and able to commence work under said subcontract; that Woolley's total payroll for his crew of men on said job during said period was $1,149.22 but he was able only to do pre-fabricating work at a payroll cost of $200.00, leaving a payroll for inactive men during said period of $949.22. That by reason of this delay Woolley was damaged in the amount of $949.22 for which sum Radkovich is indebted to Woolley but

no part of said sum is due or owing from Radkovich's Sureties to Woolley. That Woolley completed the subcontract work and the other work required of him by Radkovich on October 6, 1948; that other than aforesaid Woolley was not delayed in the completion of his work through fault of Radkovich.

XVII.

That Woolley presented to Radkovich an estimate dated September 25, 1947, for materials, sales tax and freight in the sum of $9,885.37; that on October 22, 1947, [225] Radkovich paid Woolley the sum of $5,000 on such estimate; that also on said date Radkovich loaned Woolley the sum of $4,000, for which loan Woolley promised to and did pay to Radkovich the sum of $500.00 as interest; that said payment of $4,000 was a loan by Radkovich to Woolley, was not a premature payment, and said sum was deducted by Radkovich from a payment made on a subsequent estimate furnished by Woolley.

XVIII.

That there is no evidence from which the Court can ascertain what amount was due Woolley under the terms of the subcontract for any one month, and there is no evidence from which the Court can ascertain whether Woolley was paid, in any one month, the sum due under the subcontract for that month, and there is no evidence from which the Court can ascertain whether, in any one month Woolley was paid more, or less than was due him for that particular month.

That there is no evidence that the terms of the subcontract were altered to change the method and amount of payments to Woolley, and there is no evidence that there was any departure from the terms of the subcontract with reference to the method and amount of payments to Woolley.

That Radkovich did not take control of said subcontract work; that there were no material changes or modifications of the plans or specifications referred to in said subcontract.

That the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses. [226]

Conclusions of Law

From the foregoing facts the Court concludes:

I.

That plaintiff Westinghouse is entitled to judgment against defendant Radkovich and his Sureties for the sum of $26,952.01, plus interest at the rate of 7% per annum on the sum of $43,514.05 for the period from April 10, 1948, to October 27, 1949, and plus interest at the rate of 7% per annum on the sum of $26,952.01 for the period October 28, 1949 to the date of judgment.

II.

That Wm. Radkovich Company, Inc., and its sureties are entitled to judgment against E. B. Woolley and his surety, Glens Falls Indemnity Company, in the total sum of principal and interest as shown in paragraph I.

III.

That E. B. Woolley is entitled to judgment against Wm. Radkovich Company, Inc. and its Sureties in the sum of $15,249.69, which amount E. B. Woolley and his surety are entitled to have deducted as an offset against the amount due Radkovich Company, Inc. and its Sureties as shown in Paragraph II.

IV.

That E. B. Woolley is entitled to judgment against said Wm. Radkovich Company, Inc., in the further sum of $949.22, which sum Glens Falls Indemnity Company is entitled to apply to diminish the amount, if any, paid by it under the judgment herein.

V.

That one-half the Court costs shall be borne by Woolley and his Surety and the other half by Radkovich and [227] his Sureties.

Let judgment be entered accordingly.

Dated this 7th day of February, 1952.

/s/ JACOB WEINBERGER,
United States District Judge.

[Endorsed]: Filed Feb. 7, 1952. [228]

n the District Court of the United States, Southern District of California, Central Division

No. 9303-W Civil

NITED STATES OF AMERICA, et al.,
Plaintiff,

vs.

VM. RADKOVICH COMPANY, INC, et al.,
Defendants.

VM. RADKOVICH COMPANY, INC., et al.,
Cross-Claimants,

vs.

. B. WOOLLEY and GLENS FALLS INDEMNITY COMPANY, a corporation,
Cross-Defendants.

NITED STATES OF AMERICA, et al.,
Cross-Claimant,

vs.

VM. RADKOVICH COMPANY, INC., et al.,
Cross-Defendants.

JUDGMENT

The above entitled action came on for trial before the Court, without a jury, on May 17, 1951, he plaintiff appearing by its attorney, Glen Behyer; the defendants Wm. Radkovich Company, Inc., corporation, United Pacific Insurance Company, corporation, General Casualty Company of Amerca, a corporation, Excess Insurance Company of merica, a corporation, and Manufacturers' Casalty Insurance Company, a corporation, appearing y Eldon V. McPharlin of Anderson, McPharlin &

Conners; defendant E. B. Woolley appearing by his attorney, Frank M. Benedict; and cross-defendant Glens Falls Indemnity Company, a corporation, appearing by John E. McCall and J. Harold Decker, and testimony having been offered and briefs filed and the Court having filed its Findings of Fact, Conclusions of Law and Order for Judgment and its Memorandum of Conclusions herein, now pursuant to said Order for Judgment,

It Is Hereby Ordered and Adjudged:

(1) That the plaintiff United States of America, at the relation of and to the use of Westinghouse Electric Supply Company, a corporation, have judgment against defendants Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company in the sum of $26,952.01, plus interest at the rate of 7% per annum on the sum of $43,514.05 for the period from April 10, 1948, to October 27, 1949, and interest at the rate of 7% on the sum of $26,952.01 for the period October 28, 1949, to the date of this Judgment, in the total sum of $35,977.13.

(2) That defendant Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and [230] Manufacturers' Casualty Insurance Company have judgment over in like amount against Wm. Radkovich Company, Inc., defendant E. B. Woolley and cross-defendant Glens Falls Indemnity Company;

(3) That defendant E. B. Woolley have judgment against United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, Manufacturers' Casualty Insurance Company in the sum of $15,249.69, which amount E. B. Woolley and his Surety, Glens Falls Indemnity Company, are entitled to offset against the judgment in favor of said Wm. Radkovich Company and its Sureties, United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company;

(4) That E. B. Woolley have judgment against Wm. Radkovich Company, Inc., in the sum of $949.22, which sum Glens Falls Indemnity Company may apply to diminish the amount, if any, paid by it under the judgment herein.

(5) That one-half the court costs, in amount of $29.32, shall be borne by defendant E. B. Woolley and cross-defendant Glens Falls Indemnity Company and one-half by Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, and Manufacturers' Casualty Insurance Company.

Dated: February 7, 1952.

/s/ JACOB WEINBERGER,
United States District Judge [231]

[Endorsed]: Filed Feb. 8, 1952.

[Title of District Court and Cause.]

MINUTE ORDER

Glen Behymer, Frank M. Benedict, Anderson, McPharlin & Conners, John E. McCall and J. Harold Decker.

You are hereby notified that judgment has been docketed and entered this day in the above entitled case.

Dated: Los Angeles, California, Feb. 8, 1952.

EDMUND L. SMITH,
Clerk
/s/ By C. A. SIMMONS,
Deputy Clerk [232-3-4]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To Westinghouse Electric Supply Company, a Corporation, and to its Attorney, Glen Behymer; Wm. Radkovich Company, Inc., a Corporation, and its Sureties, and their Attorneys, Anderson, McPharlin & Conners; and to E. B. Woolley and his Attorney, Frank M. Benedict:

You and Each of You Will Please Take Notice that on Monday, the 3rd day of March, 1952, at 10:00 a.m., or as soon thereafter as counsel may be heard, in the above entitled Court, located on the 2nd Floor of the Federal Building, Los Angeles,

alifornia, Cross-Defendant Glens Falls Indemnity ompany will move the Court for an order setting ide the judgment herein and granting a new trial the Glens Falls Indemnity Company, and for ch other order or orders as may be meet and just.

Dated: February 18, 1952.

JOHN E. McCALL and
J. HAROLD DECKER,
/s/ By JOHN E. McCALL,
Attorneys for Cross-Defendant Glens Falls Indemnity Company [236]

MOTION FOR NEW TRIAL

Now Comes Glens Falls Indemnity Company, ross-Defendant in the above entitled cause, and oves this Honorable Court for an order setting ide the judgment herein against this Cross-Defendant and granting a new trial of the above entled cause, for the following reasons:

1. Newly discovered evidence, documentary and al, of material facts which existed at the time of e trial of this case, but which evidence was not iscovered prior to the time of the trial, nor at the me of the trial, nor during said trial, by reason of xcusable ignorance. Said evidence would materially ffect the rights and liabilities of the parties in the bove entitled action.

2. The judgment herein is against the law, and e Court was in error in holding that Glens Falls

Indemnity Company is liable to Wm. Radkovich Company, Inc., and its sureties, in that:

(a) Glens Falls Indemnity Company should be completely exonerated by reason of the following: On or about the 25th of September, 1947, the electrical subcontractor, E. B. Woolley, prepared a list of electrical materials in the total sum of $9,885.37 (Glens Falls Exhibit 13) and on or about the 22nd of October, 1947, Woolley went to Radkovich and demanded payment of $9,885.37 based on said statement of September 25, 1947. Radkovich denied that said $9,885.37 was yet due but agreed to and [238] did pay Woolley $5,000.00 on said statement. Woolley then stated to Radkovich that "he couldn't operate unless he got $4,000.00 more." (Rep. Tr. p. 76, lines 3-4; Court's Memorandum of Conclusions, p. 26, lines 22-25). Said statement by Woolley that he could not continue performance under his subcontract without said additional $4,000.00 payment constituted an act on the part of the Principal, E. B. Woolley, which required Radkovich, under the terms of the subcontract bond, to give immediate written notice of said act to this Cross-Defendant Surety, which Radkovich failed to do.

(b) Glens Falls Indemnity Company should be completely exonerated by reason of the following: On or about April 10, 1948, the plaintiff, Westinghouse Electrical Supply Company, gave written notice to Wm. Radkovich Company, Inc., that E. B. Woolley had not paid it a past-due account in the sum of $43,514.05 for materials supplied and used

connection with Woolley's work provided for in e electrical subcontract (Findings of Fact, Par. II, p. 5, lines 3-8). The Obligee, Wm. Radkovich ompany, Inc., failed to give this Cross-Defendant urety written notice of said non-payment by Wool- until on or about June 10, 1948 (Radkovich's xhibit "F"), whereby the said Wm. Radkovich ompany, Inc., breached the condition precedent ntained in the electrical subcontract bond requir- g it to give the Surety such written notice "im- ediately".

(c) Glens Falls Indemnity Company should be mpletely exonerated by reason of the material ad- tions to the electrical subcontract in excess of ,000.00 in labor and materials which were not quired under said subcontract nor under any anges or modifications thereof, [239] but which ere performed and supplied by the electrical sub- ntractor, E. B. Woolley, at the request of the ime contractor, Wm. Radkovich Company, Inc., Findings of Fact, Par. XV, p. 6, lines 14-20).

(d) Glens Falls Indemnity Company should be mpletely exonerated by reason of the breach or eaches of the electrical subcontract by Wm. Rad- ovich Company, Inc., in that, among other things, delayed the commencement and completion of Woolley's performance of said subcontract (Find- gs of Fact, Par. XVI, p. 7, lines 8-16; Court's emorandum of Conclusions, p. 44, lines 5-9 and nes 28-31).

(e) Glens Falls Indemnity Company should be

completely exonerated in that the evidence shows that on or about October 22, 1947, Wm. Radkovich Company, Inc., paid E. B. Woolley $4,000.00 under protest and before said payment was due under the terms of the electrical subcontract when Woolley stated he could not proceed with his subcontract unless he received said $4,000.00. (Rep. Tr. p. 76, lines 3-4; Court's Memorandum of Conclusions, p. 26, lines 22-25).

(f) Glens Falls Indemnity Company should be completely exonerated by reason of the following: Between the time of E. B. Woolley's second statement for electrical materials, dated November 1, 1947, and his third such statement, dated November 24, 1947, (Glens Falls Exhibit 13), Wm. Radkovich Company, Inc., without the knowledge or consent of this Cross-Defendant Surety, materially altered the method of payment to E. B. Woolley from that provided for under the terms of the electrical subcontract (Rep. Tr. p. 237, lines 4-25; Court's Memorandum of Conclusions, p. 23, lines 3-8). [240]

3. The judgment herein is against the law and the Court was in error in holding that the Glens Falls Indemnity Company has failed to establish any of the allegations relied upon as defenses (Findings of Fact, Par. XVIII, p. 8, lines 27-28).

This motion is based upon the affidavit of Ralph E. Fergason, attached hereto as Exhibit "A", and the affidavit of John E. McCall, attached hereto as Exhibit "B", and upon all the files and records in said action.

Wherefore, Cross Defendant Glens Falls Indemnity Company moves that it may be granted a new trial in said cause upon a date certain to be fixed by the Court.

Dated: February 18, 1952.

Respectfully submitted,

JOHN E. McCALL and
J. HAROLD DECKER,
/s/ By JOHN E. McCALL,
Attorneys for Cross-Defendant Glens Falls Indemnity Company [241]

Affidavit of Service by Mail attached. [246]

[Endorsed]: Filed Feb. 18, 1952.

[Title of District Court and Cause.]

MINUTE ORDER

Judge Weinberger's calendar, February 26, 1952.

It appearing that through a clerical error the judgment in the above entitled matter signed February 7, 1952, did not conform to the findings of fact and conclusions of law herein, in that the name Wm. Radkovich Company, Inc., was omitted from paragraph 3 at line 5 of said judgment and good cause appearing therefore,

It Is Ordered that said judgment is corrected so that the words Wm. Radkovich Company, Inc., are inserted at line 5 after the word against.

The clerk is ordered to make said correction by interlineation.

Copies to: John E. McCall, Esq., Eldon V. McPharlin, Esq., Frank M. Benedict, Esq.

Correction made Feb. 26, 1952.

EDMUND L. SMITH,
Clerk
By JOHN A. CHILDRESS,
Deputy [250]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Feb. 27, 1952, at San Diego, Calif.

Present: The Honorable Jacob Weinberger, District Judge; Deputy Clerk J. M. Horn; Reporter Ross Reynolds.

Counsel for Plaintiff: No appearance.

Counsel for Defendant: No appearance.

Good cause appearing therefor,

It Is Ordered that the motion for new trial in the above-entitled matter be, and the same is continued for hearing to March 17, 1952, 2 p.m.

EDMUND L. SMITH,
Clerk
/s/ By J. M. HORN,
Deputy Clerk [251]

[Title of District Court and Cause.]

MINUTE ORDER

Judge Weinberger's calendar, March 6, 1952.

Good cause appearing thereof, It Is Ordered that the motion for new trial in the above entitled matter be and the same is continued for hearing to March 24, 1952, at 2:00 p.m., to be heard in the courtroom of the above entitled Court at San Diego, California.

Copies to: John E. McCall, Esq., Eldon V. McPharlin, Esq., Frank M. Benedict, Esq. [252]

[Title of District Court and Cause.]

MINUTE ORDER

Judge Weinberger's calendar, March 17, 1952.

It appearing that the motion for new trial filed by Glens Falls Indemnity Company has been set for March 24, 1952, at 2:00 p.m. and it further appearing that no argument is necessary on said motion,

It Is Ordered said motion will on said date be submitted without argument.

It Is Further Ordered that any counsel desiring to file a brief on said motion may do so on or before said date.

Copies to: John E. McCall and J. Harold Decker, Esqs., Eldon V. McPharlin, Esq., Frank M. Benedict, Esq. [253]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: March 24, 1952, at San Diego, Calif.

Present: The Honorable Jacob Weinberger, District Judge; Deputy Clerk J. M. Horn; Reporter Ross Reynolds.

Counsel for Plaintiff: Glen Behymer (no appearance) for plf ex rel.

Counsel for Defendant: No appearance.

For submission of motion for new trial.

Ordered: continued to April 15, 1952, 10 a.m., for submission.

EDMUND L. SMITH, Clerk,

/s/ By J. M. HORN, Deputy Clerk [254]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 15, 1952, at San Diego, Calif.

Present: The Honorable Jacob Weinberger, District Judge; Deputy Clerk John M. Horn; Reporter Ross Reynolds.

Counsel for Plaintiff: No appearance.

Counsel for Defendant: No appearance.

For submission of motion for a new trial.

It Is Ordered that the cause stand submitted.

EDMUND L. SMITH,
Clerk
/s/ By J. M. HORN,
Deputy Clerk [255]

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

A motion for new trial was filed herein by the Glens Falls Indemnity Company, a corporation. Affidavits and briefs in support of said motion and in opposition thereto were filed by respective counsel, who submitted said motion without argument.

The grounds for said motion are that new evidence has been discovered and that the judgment rendered by the Court is against the law.

While it is the Court's view that the so-called evidence set out in the brief of Glens Falls Indemnity could have been discovered prior to or during the trial had reasonable diligence been used, the evidence is not such as would materially affect the rights and liabilities of the parties in the above entitled action.

With reference to the matters set forth by counsel for Glens Falls Indemnity in his brief as errors of law, the Court has carefully re-examined its opinion filed herein, and has noted, as pointed out by counsel for Radkovich and Sureties in his brief on said

motion, that such matters were subject to distinct and separate findings [256] of the Court. The cases cited by counsel for Glens Falls Indemnity Company were, for the most part, considered by the Court in rendering its opinion; we find nothing in the record on the motion for new trial to lead us to adopt contrary views.

The motion for new trial is denied.

Dated this 10th day of June, 1952.

/s/ JACOB WEINBERGER,
United States District Judge [257]

[Endorsed]: Filed June 10, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Glens Falls Indemnity Company, Cross-Defendant above named, hereby appeals to the United States Court of Appeals, for the Ninth Circuit, from the final judgment entered in this action on June 10, 1952.

Dated: July 7, 1952.

JOHN E. McCALL and
J. HAROLD DECKER,
/s/ By JOHN E. McCALL,
Attorneys for Appellant and Cross-Defendant Glens Falls Indemnity Company. [257-b]

Affidavit of Service by Mail attached. [257-c]

[Endorsed]: Filed July 7, 1952.

[Title of District Court and Cause.]

STIPULATION FOR EXTENDED TIME FOR DESIGNATION OF RECORD AND FOR DOCKETING AND FILING RECORD ON APPEAL

Whereas, counsel for appellant, John E. McCall and J. Harold Decker, have associated with them for the purposes of appeal Albert Lee Stephens, Jr.; and

Whereas, it is necessary to allow sufficient time for said associate counsel to become familiar with the records, papers and pleadings in the above entitled action; and good cause appearing therefor

It Is Hereby Stipulated by and between counsel of record for the respective parties as follows:

I.

The time within which the record on appeal shall be designated and the case docketed in the Court of Appeals is hereby extended to the 15th day of September, 1952, being a total of 70 days from the date of filing Notice of Appeal.

II.

Appellant shall have to and including August 8, 1952 to designate the record on appeal.

III.

Respondents shall have 20 days after the service and filing of such designation of the record on ap-

peal by appellant to serve and file a designation of additional portions of the record, proceedings and evidence to be included in the record on appeal.

IV.

The foregoing stipulation is subject to order of court and the parties hereto expressly waive notice.

Dated: July 22, 1952.

ANDERSON, McPHARLIN & CONNERS,
/s/ By ELDON V. McPHARLIN,
Attorneys for Defendants and Cross-Claimants [261]

/s/ FRANK M. BENEDICT,
Attorney for Cross-Claimant E. B. Woolley

/s/ GLEN BEHYMER,
Attorney for Plaintiff

JOHN E. McCALL and
J. HAROLD DECKER,
/s/ By JOHN E. McCALL,
Attorneys for Glens Falls Indemnity Company

It Is So Ordered.
/s/ JACOB WEINBERGER,
Judge [262]

[Endorsed]: Filed Aug. 6, 1952.

[Title of District Court and Cause.]

STIPULATION FOR FURTHER EXTENSION OF TIME FOR DESIGNATION OF RECORD AND FOR DOCKETING AND FILING RECORD ON APPEAL

Whereas, by inadvertence the Reporter's Transcript of Testimony has not been completed; and

Whereas, additional time is necessary to obtain the remainder of the Reporter's Transcript; and

Whereas, the Clerk will need sufficient time to thereafter complete certification of the record; and

Whereas, counsel for all parties to the appeal desire to have available the exhibits introduced in evidence for their further inspection;

Now Therefore, It Is Hereby Stipulated by and between counsel of record for the respective parties as follows:

I.

The time within which the record on appeal shall be designated and the case docketed in the United States Court of Appeals is hereby extended to the 5th day of October, 1952, being a total of 90 days from the date of filing of Notice of Appeal.

II.

The foregoing stipulation is subject to order of Court and the parties hereto expressly waive notice.

Dated: September 11, 1952.

ANDERSON, McPHARLIN & CONNERS,
/s/ By KENNETH E. LEWIS,
Attorneys for Defendants and Cross-Claimants

/s/ FRANK M. BENEDICT,
Attorney for Cross-Claimant E. B. Woolley

/s/ GLEN BEHYMER,
Attorney for Plaintiff [277]

JOHN E. McCALL,
J. HAROLD DECKER,
GEORGE B. T. STURR and
ALBERT LEE STEPHENS, JR.,
/s/ By ALBERT LEE STEPHENS, JR.,
Attorneys for Glens Falls Indemnity Company

It Is So Ordered. 9/12/52.

/s/ PAUL J. McCORMICK,
Judge [278]

[Endorsed]: Filed Sept. 12, 1952.

In the United States Court of Appeals
for the Ninth Circuit

No. Undocketed

GLENS FALLS INDEMNITY COMPANY, a Corporation,

Appellant,

vs.

WM. RADKOVICH COMPANY, INC, a Corporation, et al.,

Appellee.

PETITION FOR EXTENSION OF TIME FOR DESIGNATION OF RECORD AND FOR DOCKETING AND FILING RECORD ON APPEAL

To: The Honorable Chief Judge of the United States Court of Appeals for the Ninth Circuit:

Petitioner Glens Falls Indemnity Company, a corporation, cross-defendant in the above captioned action, respectfully shows:

Judgment was rendered against petitioner in the United States District Court for the Southern District of California and petitioner has filed Notice of Appeal on the 7th day of July, 1952. Petitioner filed its designation of the entire record. However, thereafter it was discovered that a portion of the testimony taken at the trial had not been transcribed by the reporter. This was immediately [280] ordered from the reporter and is now in pro-

cess of preparation, but has not been delivered to the Clerk of the District Court or to counsel. The undersigned has been associated in the case for the purpose of appeal and did not engage in the trial of the action and consequently is unfamiliar with the contents of the portion of testimony not yet transcribed.

The time within which the appeal must be docketed in this court has been extended by the District Court to and including the 5th day of October, 1952, being 90 days from the date of filing Notice of Appeal and the District Court has no power to further extend the time for docketing the appeal. Additional time is necessary to enable the transcript of testimony to be prepared and filed and to be examined by counsel and to enable the undersigned counsel for appellant to become familiar therewith so that he may prepare the points upon which appellant intends to rely and a designation of record material to the consideration of the appeal. After the record is transmitted to this court, it will no longer be possible for counsel to inspect exhibits and further inspection thereof is necessary. It is also necessary for the Clerk of the District Court to have time enough to prepare and certify the record.

This petition is made and based upon the allegations contained herein and the Affidavit of Albert Lee Stephens, Jr., attached hereto.

Wherefore, petitioner respectfully requests that [281] the time within which the appeal must be

docketed in this court be enlarged and extended for 30 days from the 5th day of October, 1952.

Dated: October 2, 1952.

JOHN E. McCALL,
J. HAROLD DECKER,
GEORGE B. T. STURR and
ALBERT LEE STEPHENS, JR.,
/s/ By ALBERT LEE STEPHENS, JR.,
Attorneys for Appellant Glens Falls Indemnity Company

So Ordered:

WILLIAM HEALY,
Circuit Judge

State of California,
County of Los Angeles—ss.

Albert Lee Stephens, Jr., being duly sworn, deposes as follows:

I am one of the attorneys of record for Glens Falls Indemnity Company which has appealed from a judgment of the United States District Court for the Southern District of California by filing Notice of Appeal dated July 7, 1952. I have read the petition of Glens Falls Indemnity Company, to which this affidavit is attached, and know the contents thereof. All of the statements therein contained are true and for the reasons stated therein it is imperative that the time within which said appeal must be docketed be extended and enlarged as requested.

Otherwise the rights of the petitioner will be seriously and materially prejudiced.

/s/ ALBERT LEE STEPHENS, JR.

Subscribed and sworn to before me this 2nd day of October, 1952.

[Seal] /s/ CATHERINE C. WILLIAMS,
Notary Public in and for the County of Los Angeles, State of California. [283]

[Endorsed]: Filed Oct. 3, 1952. Paul P. O'Brien, Clerk. [282]

[Endorsed]: Filed Oct. 6, 1952. Edmund L. Smith, Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 286, inclusive, contain the original Complaint; Summons and Returns of Service; Motion to Bring in Third Party Cross-Defendant; Cross-Claim; Order Granting Leave to Serve Third Party; Answer of Defendants United Pacific Insurance Company et al to Complaint; Answer of Defendant Wm. Radkovich Company, Inc. to Complaint; Answer of E. B. Woolley to Complaint; Answer of Cross-Defendant Glens Falls Indemnity Company to Cross-Claim; Answer of Cross-Defendant E. B. Woolley to Cross-Claim; Cross-Claim

Upon Bond and Against Contractor for Materials and Labor Upon Government Contract; Copy of Letter dated Sept. 21, 1949 from Clerk of District Court to Counsel; Answer of Cross-Defendant Wm. Radkovich Company to Cross-Claim of E. B. Woolley; Answer of Cross-Defendants United Pacific Insurance Company et al to Cross-Claim; Copies of Letters dated Dec. 29, 1949 and May 4, 1950 from Clerk of District Court to Counsel; Stipulation and Order Extending Time for Filing of Opening Brief; Stipulation and Order for Filing Supplement and Amendment to Cross-Claim; Supplement and Amendment to Cross-Claim; Stipulation and Order Extending Time for Filing of Reply Brief of Wm. Radkovich Company Inc., and its Sureties; Stipulation and Order for Extension of Time for Filing of Reply Brief of Cross-Claimant E. B. Woolley; Order Transferring Case Pursuant to Rule 2; Stipulation and Order for Amendment of Cross-Claim, etc.; Memorandum of Conclusions; Minute Orders of Sept. 26, 1951, and Oct. 9, 1951; Memorandum re Proposed Findings, Conclusions and Judgment and Objections Thereto with Attached Documents; Findings of Fact and Conclusions of Law; Judgment; Copy of Notice of Entry of Judgment; Motion for New Trial with Notice of Motion, Points and Authorities and Exhibits; Minute Order of Feb. 26, 1952; Minutes of the Court for Feb. 27, 1952; Minute Orders of March 6 and 17, 1952; Minutes of the Court for March 24 and April 15, 1952; Order Denying Motion for New Trial; Notice of Appeal; Stipulation and Order Fixing

Amount of Supersedeas Bond; Stipulation and Order Extending Time to File Record and Docket Appeal; Designation and Counter-Designation of Record on Appeal; Stipulation and Order for Further Extension of Time for Designation of Contents of Record on Appeal and for Docketing and Filing Record on Appeal; Certified Copy of Petition for and Order Extending Time for Designation of Contents of Record on Appeal and for Docketing and Filing Record on Appeal entitled in Court of Appeals; and Stipulation for Supplemental Designation of Record which, together with original Radkovich and Sureties Exhibits A to M, inclusive, and Woolley and Glens Falls Indemnity Co. Exhibits 1 to 14, inclusive, and Reporter's Transcript of Proceedings on May 17, 18, and 19, 1950, and January 26, 1951, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $4.00 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 31st day of October, A.D. 1952.

[Seal] EDMUND L. SMITH,
Clerk
/s/ By THEODORE HOCKE,
Chief Deputy

In the United States District Court, Southern District of California, Central Division

No. 9303-Y-Civil

[Title of Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Wednesday, May 17, 1950

Honorable Jacob Weinberger, Judge Presiding.

Appearances: For the Plaintiff: Glenn Behymer, Esq. For Defendants, Cross Complainants, and Cross Defendants Wm. Radkovich Company, Inc., United Pacific Insurance Company, General Casualty Company of America, Excess Insurance Company of America, Manufacturers' Casualty Insurance Company: Messrs. Anderson, McPharlin & Conners, by Eldon V. McPharlin, Esq. For Defendant, Cross-Defendant, and Cross-Complainant E. B. Woolley: Frank M. Benedict, Esq. For Cross Defendant Glens Falls Indemnity Company: John E. McCall, Esq., and Harold S. Decker, Esq. [3*]

(Case called for trial by the clerk.)

Mr. Benedict: For the purpose of the record, I might state that the defendant Woolley is also a cross-claimant in this matter as well as the defendant.

The Court: I have read the briefs that are on

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

file, that is to say, the trial memoranda. Are there any preliminary statements to be made now defining the issues?

I imagine the first issue to be determined is whether or not these materials were extras or they were required by the contract. That is the principal controversy, isn't it, insofar as the subcontractor is concerned?

Mr. Benedict: I might say this, your Honor, that not necessarily these claims that are involved in this matter but the action, of course, is instituted by Westinghouse to recover some $43,000 for materials which Woolley admits were furnished him, the subcontractor.

The Court: No one disputes the validity of the Westinghouse claim, is that correct?

Mr. Benedict: It is my understanding that we do not. We certainly do not. Woolley does not dispute it.

Mr. Behymer: There is only one thing that should be added to the court's remark in regard to that, and that is, that since the action was filed on November 1, 1949 there has [4] been paid on account to Westinghouse the sum of $16,562.04.

The Court: Yes; I understand that. These papers show that. But the claim of the Westinghouse company is not disputed, is it?

Mr. Behymer: I understand it is not disputed. I understand from Mr. McPharlin, however, he wanted a statement made by the subcontractor and his surety that it is not disputed, before he would join in a stipulation with respect to that matter.

Mr. McPharlin: In reference to that, I represent the prime contractor and its sureties. We have, of course, no knowledge of the dealings between the subcontractor and Westinghouse. If the subcontractor and the subcontractor's surety company wish to stipulate that these materials were furnished them and used in that construction on this work, why, I will accept that stipulation.

Mr. Benedict: We so stipulate.

Mr. McCall: The surety for the subcontractor will join in the stipulation, because we are taking the word of the principal that the material was furnished for and went into that job.

The Court: What is the amount claimed?

Mr. Behymer: The amount that is claimed——

The Court: Which you stipulate is going to Westinghouse?

Mr. Behymer: The amount that is claimed is a balance of [5] principal, after that occurred which I refer to, of $26,952.01, interest on $43,514.05——

The Court: Pardon me. $26,900 and what?

Mr. Behymer: $26,952.01; that is after the application of the payment on account of the principal; also interest on $43,514.05 from April 10, 1948 to November 1, 1949, and interest on the balance——

The Court: That is at 7 per cent, is it?

Mr. Behymer: Yes.

The Court: That is the rate, 7 per cent?

Mr. Behymer: That is the legal rate.

Mr. Benedict: The legal rate.

Mr. Behymer: And interest on the balance of $26,592.01 from November 1, 1949——

The Court: $26,952.01 from when?

Mr. Behymer: From November 1, 1949, the date of the payment of the $16,000-odd.

The Court: Any dispute as to the interest? Is there any dispute as to the interest?

Mr. McCall: Your Honor, I do not know. I have just asked my associate here, Mr. Decker, whether he knew whether or not it was entitled to interest under the law, and he does not know, either. So it seems to me that we will have to check the law, unless the court already knows it.

Mr. Behymer: I submit that the obligation is the same as [6] the obligation of the principal. The obligation of the surety is the same as the obligation of the principal.

The Court: If there was a set time for the payment of the principal and it was not paid at that time, I imagine it would draw interest.

Mr. Behymer: It is alleged, and I understand that it is not denied now, that under the terms of the contract the merchandise purchased was payable on the 10th of the month next succeeding the month of delivery. The last delivery on the contract was in the month of March, 1948. That made the interest run from April 10, 1948. There would have been interest on varying balances prior to that date. We have not prayed for that item. We have prayed only for interest on the whole balance from the 10th of the month next succeeding the last delivery. The account started to run, the first delivery was in November of '47, and the deliveries were

between November, December, January, February, and March.

The Court: I imagine your contract and your invoices show everything with respect to due dates.

Mr. Behymer: I can call Mr. Woolley to testify but, as I understand, it is not necessary to establish that because the law would imply interest from the date of completion or performance of the contract in any event.

The Court: I think it would. I am just wondering if you gentlemen would care to stipulate, after you have [7] examined your invoices and your contract, if you are satisfied as to the dates.

Mr. Behymer: They are all set up in detail in the complaint itself, the times of delivery and the amounts and the items. Really, it is in the nature of a bill of particulars.

Mr. McCall: We understand, your Honor, that Mr. Woolley states that these accounts are payable on the following month, the 10th.

The Court: On the month following the delivery, is that correct?

Mr. McCall: Yes, sir.

The Court: Before the 10th?

Mr. McCall: By the 10th, anyway.

The Court: By the 10th.

Mr. Behymer: And that is all we are praying for.

The Court: That is the way your claim is set up?

Mr. Behymer: That is correct.

Mr. McCall: As I understand it, the Westinghouse suit, represented by Mr. Behymer, is the only one here that is under the Miller Act—no. I pre-

sume the cross complaint of the subcontractor is under the Miller Act. Now, the cross claim——

The Court: Pardon me, before you go into that. May we clean up this interest matter?

Mr. McCall: Oh, I was thinking that was cleared up, your Honor. [8]

The Court: I just wondered if everybody agrees that that is the situation; that the stipulation was that interest from the date stated in the complaint with the particulars as set out, if you gentlemen are prepared to stipulate that is correct.

Mr. Behymer: I, of course, offer to so stipulate.

Mr. Benedict: I think the stipulation should be based on Mr. Behymer's statement, because of the payment on November 1st. He stated the way the interest would run, and I will so stipulate, based on that statement.

The Court: If you will make a statement in that respect?

Mr. Behymer: Well, I have just made it. The statement is that the amount in principal is $26,952.01; that interest runs from April 10, 1948 to November 1, 1949 at the legal rate on $43,514.05; that there was paid on November 1, 1949, $16,562.04; and that from November 1, 1949, the interest is to be calculated on the balance then remaining of $26,952.01.

Mr. Benedict: So stipulated.

Mr. McCall: So stipulated by the surety for the subcontractor, Glens Falls.

Mr. McPharlin: So stipulated by the prime contractor and sureties.

Mr. Behymer: I believe that I would then like to be excused from further attendance on the trial, because I am not interested in the balance of the controversy. [9]

The Court: You are not interested possibly in the discussion of your records as to any of these bonds, if you claim any——

Mr. Behymer: Our action in this case is only against the subcontractor who directly incurred the obligation, Mr. Woolley.

The Court: And on his bond?

Mr. Behymer: Against the general contractor, as principal, on the Miller Act bond, and against the four surety companies on the principal's bond, the four surety companies represented by Mr. McPharlin.

I did not join in our action on the main action the surety on the subcontractor's bond. It is not a defendant in my action.

The Court: Does that satisfy the appearance of counsel?

Mr. McCall: It does insofar as the surety for Mr. Woolley, the subcontractor.

The Court: Yes.

Mr. McPharlin: Yes. Mr. Behymer has made a correct statement of the pleadings, your Honor.

Mr. Behymer: There is one other thing before I ask to be excused. Some of you gentlemen asked me to present today this contract and bond. Do you want me to introduce it into evidence?

Mr. McCall: I might state that after the court made the [10] suggestion yesterday that all the at-

torneys get together and decide on the exhibits, we did that very thing, and we have all agreed upon the exhibits we have prepared. We can hand them in in any order that the court may suggest.

The Court: Very well. You have a claim, that is, you referred to a claim as to the bond of the general contractor, is that correct?

Mr. Behymer: Against the general contractor, as the principal on that bond, and against the four cosureties, as sureties on that bond.

The Court: Are there any defenses set up by the insurance companies in relation to this matter as affecting the Westinghouse?

Mr. McCall: Your Honor means the insurance companies for the prime contractor?

The Court: For the prime contractor.

Mr. McPharlin: Insofar as the prime contractor is concerned and their answer to the Westinghouse claim, they have denied that on the basis of lack of information.

The Court: I am sorry, I can't hear you.

Mr. McPharlin: The claim of Westinghouse has been denied by the prime contractor and its sureties, in the pleadings, on the basis of lack of information or belief. Now, since we have accepted that stipulation, there is no further defense to the claim of Westinghouse. [11]

The Court: That is the prime contractor. Now, what about the sureties?

Mr. McPharlin: And that is true of the sureties, also.

The Court: Also, of the sureties.

Mr. McPharlin: Yes. And I think our next step now, of course, is between the prime contractor and its sureties and the subcontractor and his sureties.

The Court: Very well.

Mr. Behymer: Do you want me to present these documents or will you gentlemen present them?

Mr. McPharlin: I think we can present them.

Mr. Behymer: All right. With that understanding, may I be excused?

The Court: So far as the court is concerned, if you have nothing further here. We may notify you later in the event something develops.

Mr. Behymer: All right. But I feel that I am showing our title to a judgment, and the controversy really is between other actors.

The Court: I see.

Mr. Behymer: But I will come at any time that I am sent for, gentlemen and the court.

Mr. McCall: Before Mr. Behymer gets away, might I make this observation and see if my understanding is correct? It is now my understanding that since the claim of Mr. Behymer's [12] client has been stipulated to, there is nothing further before the court under the Miller Act; that leaves only the suit of Radkovich Company, the prime contractor, against the subcontractor, represented by Mr. Benedict, and the suit of the prime contractor and its sureties against the subcontractor's sureties. Of course, none of that could be under the Miller Act and will not be controlled, as I understand it, by any phase of the Miller Act.

Mr. McPharlin: No. I believe Mr. McCall over-

looked that the cross-claim of the subcontractor against the prime contractor is under the Miller Act, I believe.

Mr. Benedict: That is correct, your Honor. Our claim is based on the Miller Act.

Mr. McCall: That is correct. I misstated that, your Honor. I overlooked it.

The Court: The cross-claim of the subcontractor against the prime contractor?

Mr. McPharlin: Yes, your Honor.

The Court: For the balance claimed to be due, that is to say, damages, etc?

Mr. McPharlin: Yes.

The Court: All in connection with the Miller Act?

Mr. McPharlin: All in connection with the Miller Act, yes; and, of course, the whole action is connected with the Miller Act, because all parties here are claimants and cross-claimants. [13] This is one action.

The Court: I take it your distinction is that part of it will be regulated by the Act and part of it by the state law; is that your thought?

Mr. McCall: That is right, your Honor; yes, sir.

The Court: Do you agree to that?

Mr. Behymer: As far as I am informed, the only person I have any right of action against under the state law is the subcontractor on his contract. As far as my recovery against the general contractor and its sureties, it must be under the Miller Act.

The Court: Your claim was filed under the Miller Act, was it not?

Mr. Behymer: It was filed, and it has been stipulated that it was properly filed and that the monies are owing; so that ends it as far as my client is concerned.

The Court: Yes; all right.

Mr. McPharlin: I do not believe the statement is entirely true that we are concerned only with the state law.

Cases under the Miller Act—there are a number of cases concerning the subcontractors' bonds, also, where the Federal Courts have ruled as to the interpretation of the subcontractor's bond and applied the same rules of liberality to the subcontractor's bond as they have to the prime contractor's bond under the Miller Act. So I think that we have that [14] same situation here.

The Court: There is no contention that this court does not have jurisdiction of the entire matter, is there?

Mr. McCall: None at all, none at all. It is our position, the position of the surety for the subcontractor, that that is not under the Miller Act but is controlled by the state law.

The Court: Yes.

Mr. Behymer: Now, may I depart?

(Mr. Behymer left the courtroom.)

Mr. McPharlin: If the court please, counsel for the remaining parties here have gone over a number of documents and agreed that they will be or may be admitted into evidence. There are quite a number and I do not know just what procedure the court would like for us to follow. But we have

the contracts, the bonds and correspondence between the parties.

I wonder if it would meet with the court's approval if we introduced all of the documents that we have agreed to at this time.

The Court: Any objection?

Mr. McCall: It seems to me that that would save time, your Honor, for the cross claimants to introduce their documents, and then the rest of us introduce our exhibits, and we will have a list of them, then we can refer to them later on.

The Court: All right; any order that you wish may be [15] followed.

Mr. McPharlin: The cross-complainant——

The Court: May I suggest this: Instead of using the word "cross-complainant", suppose you use the name of the entity involved, because we have so many cross-actions one way and another that we may have a little confusion.

Mr. McPharlin: May I refer to the prime contractor and its sureties, instead of naming the four sureties, your Honor?

The Court: Yes. The prime contractor, of course, is the Radkovich Company.

Mr. McPharlin: Is the Radkovich Company.

The Court: You may use the name. I think you had better just say "Radkovich Company and sureties."

Mr. McPharlin: In behalf of the Radkovich Company and its sureties I offer into evidence, first, the agreement by the parties authorizing the payment of $16,562.54 to the Westinghouse Company.

The Clerk: That will be Radkovich et al. Exhibit into evidence.

The Court: You mean with whom, now, for my otes?

The Clerk: Mr. McPharlin.

Mr. McPharlin: Yes, sir.

The Clerk: Do you wish to call the court's attention to the agreement?

The Court: Agreement with whom, so I may ave it in my [16] notes?

Mr. McPharlin: This is a document addressed to Vm. Radkovich Company, Inc. and its sureties, requesting and authorizing them to pay to Westinghouse Electric Supply Company the sum of $16,-62.54, which was the amount that Radkovich and s sureties admitted was due and owing to Wooley under his subcontract. This is executed by Wooley and his attorney, by Woolley's surety and the urety company's attorney.

The Court: That authorized the payment of the 16,000?

Mr. McPharlin: Yes, your Honor.

On behalf of Radkovich and his sureties I offer ext into evidence a document entitled "Contract No. W-04-353-ENG-2050 Construction Contract War Department". This is the contract, the prime ontract, between Wm. Radkovich Company and he United States Government for this work. This locument contains the prime contract, also the plans nd specifications, the change orders, consisting of wo change orders, copies of the payment and per-

formance bonds posted with the Government by the Radkovich Company.

The Clerk: That will be said Defendants' Exhibit B into evidence.

The Court: It will be received.

Mr. McPharlin: I next offer into evidence a document entitled "Sub-Contract re War Department Construction". This [17] is a subcontract between Wm. Radkovich Company, Inc. and E. B. Woolley, dated July 30, 1947, which is the subcontract with which we are here involved.

Also attached to this document is the Performance Bond No. 320853 and the Payment Bond of the same number, executed by the Glens Falls Indemnity Company to Wm. Radkovich Company, Inc., as obligee. This is the performance and payment bond executed by the Glens Falls Indemnity Company in reference to the subcontract of E. B. Woolley.

The Court: Exhibit C?

The Clerk: Yes, your Honor; Defendants' Exhibit C into evidence for the Radkovich Company and sureties.

Mr. McPharlin: I offer next into evidence a number of documents which I would like to offer as one exhibit. These are on the letterhead of Wm. Radkovich Company, Inc., and are entitled "Equipment Rental and Back Charge Report". These documents consist of the back charges of Radkovich Company against E. B. Woolley.

The Clerk: Admitted, your Honor?

The Court: They may be received.

The Clerk: They will be Radkovich's and sure-es' Exhibit D into evidence.

The Court: That last one has to do with some ectrical equipment claimed to have been furnished the Radkovich Company, is that correct? [18]

Mr. McPharlin: Yes, your Honor.

Mr. Benedict: Well, not altogether, your Honor. includes that, plus a lot of other back charges.

The Court: Other back charges?

Mr. Benedict: Yes. Some of those back charges e concede and furnished Mr. McPharlin with a list those that we do concede. It might be well to in-oduce that.

Mr. McPharlin: Do you have an extra copy?

Mr. Benedict: I can furnish you with another ne. I do not have it. You can introduce that into idence and shorten the matter by indicating the nes that we concede, if that is agreeable to the ourt. A lot of those back charges we do not con-ede, however.

Mr. McPharlin: In reference to the back charges, ne back charges claimed by Wm. Radkovich Com-any, your Honor, total $7,887.09.

The Court: And you concede how much of that, r do you know?

Mr. Benedict: Would you read that off, Mr. Mc-Pharlin?

Mr. McPharlin: The subcontractor admits that ne sum of $2,213.53 is proper and is conceded as a roper back charge.

Does the surety of Woolley also admit to the

propriety of the back charges that Woolley has conceded?

Mr. McCall: Yes; that is, the Glens Falls, surety for the subcontractor, will admit all of those that Mr. Woolley [19] through his counsel has admitted.

Mr. McPharlin: I will offer that next into evidence, the back charges which are conceded by the subcontractor.

Mr. McCall: Your Honor, I do not know whether it is proper for us to have a stipulation to the effect that, while we do not any of us object to the exhibits that we are putting in, I think none of us should be bound by those exhibits. In other words, we do not admit the facts in those exhibits.

The Court: Insofar as the Glens Falls is concerned, the insurance company, you do not wish to admit liability?

Mr. McCall: That is right.

The Court: But, with that exception, you do apparently agree that the figures are correct, without admitting your liability; is that your position?

Mr. McCall: I am not sure we can go that far, but I do not think, in fairness to all of us here before the court, that any of us should be bound by any of the exhibits offered into evidence by the others.

The Court: At any rate, they are your exhibits and you are offering them. Now, what about objection on your part?

Mr. McCall: Oh, to save time, we are not objecting to the offer.

The Court: You are not objecting to this offer,

ut reserve your rights to contest whatever they ay show?

Mr. McCall: The facts. [20]

The Court: Yes.

Mr. McCall: Or the law.

The Court: Does that satisfy your offer?

Mr. McPharlin: I am not quite clear. Insofar as ur stipulation here in reference to exhibits, it is at they are admissible and are what they repre- nt to be, and they are admitted as evidence.

The Court: Well, let us start all over again. You ve filed Exhibit D, which shows the back charges $7,887.09. This Exhibit E is an admission by the bcontractor, your subcontractor——

Mr. McCall: Yes, your Honor.

The Court: ——of $2,213.53 being proper, a oper charge against the subcontractor.

Mr. McCall: Yes.

The Court: So would not the surety, Glens alls, take the same position?

Mr. McCall: Yes; as to that. But as to the bal- nce of the $7,000 and something we deny that as ing proper.

The Court: There is no admission that I know of to the balance. It is merely an offer to establish s case by his exhibits.

Mr. McCall: Yes. So that the fact we are not ob- cting, any of us, as we go along does not mean that e are willing to be bound by the various exhibits troduced by the other. [21]

The Court: But you are bound, however, by the lmission of $2,213.53 as a proper charge?

Mr. McCall: Yes.

The Court: But you do not admit the balance?

Mr. McCall: And not bound by anything except what we admit as we go along.

The Court: I understand. Do you understand that?

Mr. McPharlin: No; not quite, your Honor.

The Court: Let us clear that up if it is not clear.

Mr. McPharlin: I refer now to the prime contract and the prime contractor's bond and the specifications and change orders. I believe that these are Exhibit No. 2. Does counsel——

The Court: There is a controversy here as between the prime contractor and the subcontractor as to this electrical equipment which the subcontractor claims are extras. That, of course, you do not admit. The subcontractor does not admit validity of the back charge on that item, is that correct?

Mr. Benedict: Well, no, we do not, your Honor. In fact, I think that is contained in some of those back charges that we dispute.

The Court: Yes.

Mr. Benedict: It seems to me, your Honor, that all we are really doing here by our stipulation regarding the exhibits is taking a short cut; that we are not objecting to the [22] exhibits, and if the exhibits were presented with foundations being laid in the regular way, the other party is never bound, except as he has admitted, as we have here in this one instance, if he wants to dispute the correctness of any of the items. I think the same thing is here. All we are doing is really waiving any foundation

being laid and we are not asking for the best evidence or anything of that kind, and we are permitting these to go in. If none of us introduced any evidence in contradiction of what has been introduced, why, the record is there. That seems to me to be the only effect of what we are doing. Perhaps I am wrong.

The Court: You are acting as a sort of spokesman in relation to these exhibits, aren't you? You are not establishing your own case right now. You are offering their exhibits.

Mr. McPharlin: Yes, your Honor.

The Court: I presume you people went over them and you agreed that these are the exhibits that may be received or that may be offered.

Mr. McPharlin: Yes, sir.

The Court: You do have a claim of some kind here that you are asserting.

Mr. McPharlin: Yes, your Honor.

The Court: And so is the subcontractor asserting a claim.

Mr. Benedict: Yes, your Honor; that is right, definitely.

The Court: You are now asserting a claim in behalf of [23] the prime contractor?

Mr. McPharlin: The prime contractor and its sureties on the cross-claim against the subcontractor and his surety.

The Court: That is, you are trying to establish now your claim of some five odd thousand dollars?

Mr. McPharlin: No, no, your Honor. On this the the action was instituted against the prime contrac-

tor and its sureties by Westinghouse, the supplier which had supplied the material to the subcontractor.

The Court: Westinghouse is out now.

Mr. McPharlin: Yes. We answered that and that has been disposed of. The prime contractor and its sureties filed a cross-claim against the subcontractor and his surety in which they prayed the court that if judgment were entered against the prime contractor and its sureties for these materials furnished to Woolley, the subcontractor, then the prime contractor and its sureties in turn be granted judgment over against the subcontractor and his surety in the same amount.

Now it appears that Westinghouse will obtain its judgment for some $26,000 plus interest that they have asked for, and if that judgment is granted against the prime contractor and its sureties, they now pray judgment over in the same amount against their subcontractor who was primarily responsible for those matters, and the subcontractor's surety which executed the bonds on behalf of the subcontractor. [24]

After that cross-claim by the prime contractor and its sureties against the subcontractor, then in the pleadings the subcontractor answered that, and then also came back with a cross-claim against the prime contractor and its sureties wherein the subcontractor claims that he still has money coming under the contract.

The Court: Doesn't the prime contractor admit owing the subcontractor so much, and doesn't he

state that he cannot pay it because of the claims that have been filed?

Mr. McPharlin: Yes; in the original answer we admitted owing the subcontractor $16,000 something.

After this matter was at issue and prior to the trial, the subcontractor and his surety gave the prime contractor a written direction to pay to Westinghouse, on behalf of the subcontractor, the amount that the prime contractor admitted was due and owing to the subcontractor. So that full amount that the prime contractor admitted was due and owing to the sub has now been paid over to the sub's material supplier. So it is now the position of the prime contractor and its sureties that they have paid the subcontractor in full on his subcontract.

The Court: I see. Very well, do you gentlemen understand that to be the situation?

Mr. Benedict: Yes; that is substantially correct. And I might just take it from there, your Honor. The subcontractor's [25] position is that he has more coming than $16,000 under the contract; that he also has some $8,000 coming in extras, and he also is entitled to additional money for damages for delay. That constitutes our cross-claim against the general contractor.

The Court: How does the prime contractor make his claim against the subcontractor?

Mr. McPharlin: The prime contractor makes his claim against the subcontractor on this basis: He has paid the subcontractor in full.

The Court: In full. And I understand that if there is a judgment in favor of the Westinghouse

people, you want that to be charged back to the subcontractor?

Mr. McPharlin: Yes; to the subcontractor.

The Court: And the surety?

Mr. McPharlin: And his surety.

The Court: Otherwise you claim you do not owe him anything?

Mr. McPharlin: Yes; that is correct, your Honor.

The Court: Is that your position?

Mr. McPharlin: Yes.

Mr. Benedict: I believe that is the position, your Honor; yes.

The Clerk: Your Honor, do I understand that Radkovich's Exhibit E is in evidence? [26]

The Court: Exhibit E is in evidence.

Mr. McPharlin: Now, your Honor, both sides have agreed to numerous letters and correspondence which may be admitted into evidence. I have a number of letters here and counsel for the other side also have a number that they will introduce.

I was wondering now whether or not we could save time by handing in these documents, without the necessity of reading them into the record or, rather, we should read all of these letters into the record.

Mr. McCall: It seems to me that at least the dates of the letters and to whom they are addressed and by whom should be read into the record.

The Court: This is the correspondence had between all concerned, is that correct?

Mr. McPharlin: Yes, your Honor.

The Court: So they will be combined exhibits of all the parties?

Mr. McCall: Yes.

The Court: But you want them identified by a date and by the author and to whom they are addressed?

Mr. Benedict: That might be well, your Honor, because I might be duplicating here on some of those they are going to put in.

Mr. McPharlin: Very well, your Honor. I will offer [27] these, I believe, as a group. I have them clipped together, but I will identify letters that are in the group.

Mr. Benedict: All I want—I have some here, too, and I am not certain whether we have the same ones or not. There is no use of taking up the time of the court, though, on that. I can check that afterwards.

The Court: If there are any additional letters after you check them, you may add them. That will be satisfactory.

Mr. McCall: We might have some answers to certain letters there. I presume, too, your Honor, that those would be exhibits for only Radkovich, the prime contractor, and his sureties.

Mr. Benedict: It might be well, for the purpose of the record in order to keep this thing on an understood basis, that you introduce the letters that you want to put in as part of your case, and then I will introduce the ones that I want to put in, and we will do it that way. It might be better.

Mr. McPharlin: Yes. These will go in as my exhibits.

Mr. Benedict: All right, all right.

The Clerk: Do you want them marked?

Mr. McPharlin: Does Mr. McCall still wish me to go through the list here now and refer to the dates?

Mr. McCall: It was my suggestion that the date of each letter and the sender and the one addressed be stated. But [28] if that is——

The Court: Why don't you do this: Why don't you offer those as your exhibits, and then if there are any other letters that there is a desire to offer, you can offer them as your exhibits.

Mr. McCall: Yes, your honor.

The Court: And then all these and others can be considered together as comprising all the correspondence?

Mr. McCall: Yes, sir.

Mr. McPharlin: I offer into evidence a group of letters which are clipped together as our next exhibit in order.

The Clerk: That will be Radkovich and its sureties Exhibit F into evidence.

The Court: It will be received.

Mr. McPharlin: I offer next into evidence a document on the letterhead of "Wm. Radkovich Company, Inc." dated, with the heading "E. B. Woolley—Electric Contract", which consists of a brief resume made by Radkovich Company of his accounting between Woolley and himself as to this subcontract.

The Court: Exhibit G.

The Clerk: Radkovich and sureties' Exhibit G in evidence.

Mr. McPharlin: I will offer next into evidence a document consisting of a number of sheets of drawings which are captioned "Muroc Army Air Field, Muroc, Calif. Temporary Family [29] Quarters—Mechanical Plans and Details Sheet 6." That is the top page of the documents.

The Clerk: How many are there there? The number of sheets?

The Court: Are those the plans referred to in the contract?

Mr. McPharlin: Yes, your Honor. There are six sheets.

The Clerk: Admitted, your Honor?

Mr. McCall: May I ask if those sheets offered bear a date?

Mr. McPharlin: These sheets bear the date June 10, 1947.

The Clerk: Are these admitted, your Honor?

The Court: They will be received. Are these drawings that are referred to and are a part of the contract?

Mr. McPharlin: Yes, your Honor.

The Court: Together with the specifications?

Mr. McPharlin: Yes, your Honor.

The Clerk: This is Radkovich's and sureties' Exhibit No. H into evidence.

Mr. McPharlin: I offer next into evidence a blueprint consisting of one sheet, which is captioned "Revised Electrical Plan Muroc Army Air Field

Muroc Cal. Temporary Family Quarters." It is dated August 27, 1947.

The Clerk: Admitted, your Honor?

The Court: It will be received. [30]

The Clerk: Radkovich's and its sureties' Exhibit I into evidence.

The Court: Is there any order or any contract or any direction that accompanies this revised sheet? I was wondering if we could not put them together and offer them as one exhibit.

Mr. McPharlin: No, your Honor. Any other written document, do you mean, pertaining to this revised electrical plan?

The Court: Yes. In other words, I take it—is this the document concerning which there was a credit allowed? I am trying to identify this document.

Mr. McPharlin: This subsequent document?

The Court: This Exhibit I.

Mr. McPharlin: No. That is, we contend, the working drawings which were required under the contract. You see, the original contract contained the plans and specifications, and it also required working drawings to be submitted by the different crafts, for example, the electrical subcontractor.

The Court: What became of that drawing?

Mr. McPharlin: That is the blueprint that I have introduced. But the original from which the blueprint was made——

The Court: Is that part of the Exhibit H? Is Exhibit I a transcript from Exhibit H?

Mr. McPharlin: The Exhibit I is the electrical

plan, whereas the Exhibit H is also the electrical plan. Exhibit I [31] contains, I believe, details which are not in Exhibit H.

The Court: Exhibit I is not taken from Exhibit H, is that it?

Mr. McPharlin: Yes; it is taken from Exhibit H, with some additional detail added to it.

The Court: What is the date that this was delivered, this Exhibit I, to the subcontractor, I take it?

Mr. McPharlin: Just prior or on or about August the 27th.

The Court: After the main contract had been executed?

Mr. McPharlin: Yes, your Honor.

The Court: And after the original plans and specifications had been made.

Mr. Benedict: And after the subcontract had been entered into, too, also, your Honor.

The Court: Is that correct?

Mr. McPharlin: Yes; that is correct.

The Court: In other words, Exhibit I is a revised sheet of some electrical work.

Mr. McPharlin: Yes, your Honor.

The Court: Which was delivered to the subcontractor for execution, is that it?

Mr. McPharlin: I don't know now, your Honor, that it was delivered to the subcontractor. The subcontractor, I believe, had a part in the preparation of this. That is something [32] for the evidence.

The Court: If you expect to follow that up with

evidence, we will get a better understanding of it.

Mr. McPharlin: Yes.

Mr. McCall: Oh, yes; that will be followed with evidence.

The Court: Yes. All right.

Mr. McPharlin: Radkovich and its sureties will call as their first witness Wm. Radkovich.

The Court: This is all that you have now of these exhibits for the time being?

Mr. McPharlin: There may be others. I do not want to foreclose myself, but that is all at the time, your Honor.

The Court: At this time, all right.

Mr. McPharlin: Will you take the stand?

WM. RADKOVICH

called as a witness by the defendants and cross-claimants, being first sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Wm. Radkovich.

The Court: Is it Radovich or Radkovich?

The Witness: Well, the "k" is silent. Some say "Radkovich" and some say "Radovich." [33]

Direct Examination

Q. (By Mr. McPharlin): What is your position with the Wm. Radkovich Company, Inc.?

A. President.

Q. And were you the prime contractor—I mean your company was the prime contractor on this Muroc job for the United States Government?

(Testimony of Wm. Radkovich.)

A. Yes, sir.

Q. Just tell the court very briefly what was this contract for; what was the construction that you were to do?

A. Construction for temporary housing at Muroc Army Air Base.

Q. What sort of temporary housing?

A. Low-weight, poured concrete houses.

Q. How many? A. 100.

Q. Did you negotiate or obtain a bid from Mr. Woolley, the subcontractor? A. I did.

Q. Your subcontract with Mr. Woolley is dated July 30, 1947. About when did he first submit his bid to you? A. I could not remember that.

Q. Well, about May or June, does that refresh your memory any? [34]

A. Probably around June.

Q. The first bid that he submitted to you was for how much? A. For $75,000.

Q. What did you tell him, if anything, when you got that bid?

A. When I got the bid I told him that that job was his.

Q. Did he later come to see you about that bid?

A. Yes; he come back later and told me he had forgot the hot water heaters and that he had to have $80,000 instead of $75,000.

Q. Who was present at that conversation?

A. Well, I wouldn't know, except myself. I know him and I were together.

(Testimony of Wm. Radkovich.)

Q. Did he give you any quotation for water heaters at that time?

A. At that time he told me the hot water heaters were costing him $61.00 wholesale.

Q. And how many hot water heaters were to be furnished under this original contract?

A. 100.

Q. And he told you that the hot water heaters would cost him $61.00 each? A. That is right.

Q. Or a total of $6,100? [35]

A. He had a figure from his wholesale house it would cost him $61.00.

Mr. Benedict: Just a minute. If the court please, if this evidence is being introduced—there is one issue here, I think, probably should be brought to the court's attention, and I imagine this evidence is directed to it. The subcontract price was $80,000. The Government decided after the job was started that they would furnish the water heaters, and they therefore deleted the water heaters from the job.

Now, there is one item of dispute there as to the amount that was to be deleted from the subcontract, and the Radkovich's claim is that there was a greater amount to be deleted than we concede is the case.

The Court: There was some amount under a thousand dollars there?

Mr. Benedict: Yes; that is right, your Honor. If the purpose of these conversations that preceded the making of the contract is to show that because the heaters were costing Woolley so much at that

(Testimony of Wm. Radkovich.)

time, and therefore the original contract price was increased that amount, and then after the contract was signed that it should be depleted or depleted by that same amount, I object on the grounds it is incompetent, irrelevant and immaterial. That is a matter for adjustment between the parties, and prices can fluctuate. And if it is introduced for any other purpose, it is certainly inadmissible [36] because all of these prior negotiations are merged in the written contract which is for $80,000.

The Court: Isn't there some documentary evidence?

Mr. McPharlin: Yes; there is documentary evidence, your Honor.

The Court: Why don't you lay a foundation?

Q. (By Mr. McPharlin): Mr. Radkovich, on July 30th you entered into the subcontract with Woolley for $80,000, is that correct?

A. That is right.

Q. And that subcontract called for the furnishing of 100 water heaters by the subcontractor?

A. That is right.

Q. Is that correct? A. That is correct.

Q. Now, I will hand you here Radkovich and its sureties exhibits, Exhibit No. B, and at the back of this document you will see a Change Order entitled "Modification No. 1" which states in part as follows:

"The Government, in lieu of the Contractor, will furnish one hundred electric water heaters, f.o.b. job site, for use under the contract.

(Testimony of Wm. Radkovich.)

"As a result of this change order the total contract commitment will be decreased in the amount of six thousand one hundred dollars." [37]

Now, was that amount deducted from your original contract price, Mr. Radkovich?

A. Yes; it was.

Q. This modification No. 1 is dated August 18, 1947, which was 18 days after the execution of your subcontract?

A. That is right.

The Court: And that all appears in exhibit what?

Mr. McPharlin: Exhibit B.

Q. Mr. Radkovich, do you recall the exact amounts of the payments you made to Woolley, or will you need this document on your letterhead to refresh your memory?

A. I need the document.

Q. I will hand you Radkovich's Exhibit No. G which you may use, and ask you to tell the court the amount of the payments which you made to the subcontractor. A. The amount of payments?

Q. That is direct payments that you made to the subcontractor. A. $48,914.27.

Q. Now, in addition to those direct payments which you testify you made to the subcontractor, did you make any payrolls on behalf of or at the request of the subcontractor to his employees?

A. Yes; on June 14th, $536.

Q. How did you happen to make that subcontractor's payroll [38] of $536?

A. He came up to the job the day——

(Testimony of Wm. Radkovich.)

Mr. Benedict: We concede that, your Honor. We concede that $536, if that will shorten it.

Q. (By Mr. McPharlin): In addition to the direct payments and the payment of that payroll, do you have any back charges against this subcontractor? A. Yes; $7,887.09.

Q. Isn't it true that in addition to those amounts Westinghouse Electric, since the commencement of this action, has also been paid $16,562.54?

A. That is correct.

Q. Then on your accounting you show nothing further due to this subcontractor?

A. That is right.

The Court: Let me see. The contract was for a total of $80,000?

The Witness: $80,000.

The Court: A credit of $6,100 and admitted charge back of $2,213.53, is that correct?

Mr. Benedict: $2,213.53.

The Court: Of which this $536 was a part, is that correct?

Mr. Benedict: No. That $536 would be in addition to that.

The Court: In addition? [39]

Mr. Benedict: Yes.

The Court: All right. I understand now the $536. It is just to give me a glimpse of the figures that you are using here, seeing if I can make my calculation as I go along.

Mr. McPharlin: Yes, your Honor.

The Court: This contract was for $80,000.

(Testimony of Wm. Radkovich.)

Mr. McPharlin: The original contract price, yes, your Honor.

The Court: And we deduct from that $6,100?

Mr. McPharlin: $6,100 even, your Honor.

The Court: $6,100. That will be $73,900. The payments were how much that you have made to Westinghouse?

The Witness: Payments was $48,914.27 that we paid Woolley.

The Court: $48,914.27 paid Woolley?

The Witness: Yes, sir.

The Court: All right. Then you paid how much to Westinghouse?

The Witness: $16,562.54.

The Court: $16,562.54 to Westinghouse?

The Witness: Yes, sir.

The Court: All right. That leaves $8,423.39 according to my calculations.

The Witness: Yes, sir; less our back charges.

The Court: Your back charges you claim are how much? [40]

The Witness: $7,887.09.

The Court: $7,887.09.

The Witness: Plus payroll $536.

The Court: Payroll $536, is that right?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. McPharlin): Do you recall the approximate date that you commenced work on the job, Mr. Radkovich?

A. I do not. I don't remember the date.